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ABSTRACT

The article examines the concept of "appropriate" educational programming as mandated under P.L. 94-142, the Education for All Handicapped Children Act. A description of the approaches to the question in effect before the Supreme Court's decision in the case of the Board of Education versus Rowley begins the article. The effect of the Rowley decision on the "appropriate" concept is explored, as is the test of whether an educational program benefits the child. Difficulties with this concept are noted as is the resulting impact on the question of the court's role in such cases. Case law developments after the Rowley case affect cases in three areas: (1) residential placement, (2) least restrictive placement, and (3) extended year programming. A method is proposed for determining appropriateness based on such factors as consistency of the proposal with the Individualized Education Program, the measurement of progress, and the selection of educational goals. It is further suggested that minimally effective programming is appropriate if it is a clear and substantial departure from the norm expected for similarly situated handicapped children. (CL)

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THE MEANING OF "APPROPRIATE" EDUCATIONAL PROGRAMMING UNDER THE EDUCATION FOR ALL HANDICAPPED CHILDREN ACT

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The Meaning of "Appropriate" Educational Programming Under the Education for All Handicapped Children Act

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I. INTRODUCTION

Enactment of the Education for All Handicapped Children Act[1] (Act) in 1975 wrought far-reaching, positive changes in American special education. Prior to its enactment, millions of handicapped children "were either totally excluded from schools or [were] sitting idly in regular classrooms awaiting the time when they were old enough to 'drop out.'"[2] Under the Act's statutory mandate that every handicapped child receive an "appropriate" education, enhanced educational opportunities were extended to thousands of previously unserved and underserved children.[3]

The core requirement of the Act is that every child receive an "appropriate" educational program, individually tailored to meet his or her unique needs.[4] To accomplish this lofty goal, the Act makes parents ac-

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1. 20 U.S.C. §§ 1400-1461 (1982).

2. Hendrick Hudson Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 179 (1982), (citing H.R. REP. NO. 332, 94th Cong., 1st Sess. 2 [hereinafter cited as HOUSE REPORT]).

3. One of the primary motivators for passage of the Act was the congressional finding that millions of handicapped children were either underserved or not served at all. The House Report concerning the Act states that:

> [T]he Committee found that there are more than 8 million handicapped children in the United States at this time [1975] and that the special education needs of most of these children are not being met.
> More than half of all handicapped children in the United States are not receiving an education appropriate to their needs; many children have undiagnosed handicaps which prevent their having a productive educational experience. One million children—usually the most severely handicapped—are receiving no education at all.

HOUSE REPORT, *supra* note 2, at 7.

4. To qualify for funds under the Act, a state must "demonstrate to the Secretary [of Educa-

tive participants in the educational process and integral members of the team which creates an individualized education program for their child.[5] The Act envisions parents working cooperatively with teachers and other professionals in a joint effort to provide appropriate educational programming.

In most cases, parents and educators concur on programming decisions. In the relatively small number of cases where disagreements arise, resolution usually comes through informal discussion and compromise; however, when this is not possible, parents can avail themselves of the formal dispute resolution mechanism established by the Act.[6] The de-

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tion] that . . . [it] has in effect a policy that assures all handicapped children the right to a free appropriate public education." 20 U.S.C. § 1412(1) (1982).

See HOUSE REPORT, *supra* note 2, at 7. *See also*, S. REP. NO. 168, 94th Cong., 1st Sess. 8-9, *reprinted in* 1975 U.S. CODE CONG. & AD. NEWS 1425, 1432-33 [hereinafter cited as SENATE REPORT].

5. The Act recognizes the value of parental involvement in the educational process. In *Rowley* the Court recognized "Congress' effort to maximize parental involvement in the education of each handicapped child." 458 U.S. at 182 n.6. The most important aspect of parental participation is the requirement that parents be accorded equal status as members of the team which formulates the individualized education plan for each child. *See* 20 U.S.C. § 1412(7)(2) (1982); 34 C.F.R. § 300.344(a)(3)(1984). The Act requires appointment of a surrogate parent for a child whose parents are unavailable. 20 U.S.C. § 1415(b)(1)(B) (1980); 34 C.F.R. § 300.514 (1984).

6. The dispute resolution mechanism established by the Act is contained in 20 U.S.C. § 1415 (1982), which reads in part as follows:

> (a) Any State educational agency, any local educational agency, and any intermediate educational unit which receives assistance under this subchapter shall establish and maintain procedures . . . to assure that handicapped children and their parents or guardians are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies and units.
>
> (b)(1) The procedures required by this section shall include, but shall not be limited to—
>
> (A) an opportunity for the parents or guardian of a handicapped child to examine all relevant records with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child;
>
> . . .
>
> (C) written prior notice to the parents or guardian of the child whenever such agency or unit—
>
> (i) proposes to initiate or change, or
>
> (ii) refuses to initiate or change, the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child;
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> • • •
>
> (E) an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.
>
> (2) Whenever a complaint has been received under paragraph (1) of this subsection, the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or by the local educational agency or intermediate educational unit, as determined by State law or by the State educational agency. No hearing conducted pursuant to the requirements of this paragraph shall be conducted by an employee of such agency or unit involved in the education or care of the child.
>
> (c) If the hearing required in paragraph (2) of subsection (b) of this section is conducted by a local educational agency or an intermediate educational unit, any party aggrieved by the findings and decision rendered in such a hearing may appeal to the State educational agency which shall conduct an impartial review of such hearing. The officer

tails of this mechanism are described by others,[7] and need not be repeated at length, although a brief summary is important. The process commences with a complaint filed by the dissatisfied parents.[8] Disputed issues are resolved at an administrative "due process hearing."[9] The losing party may appeal the administrative decision to the state educational agency.[10] Following exhaustion of administrative remedies, judicial re-

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conducting such review shall make an independent decision upon completion of such review.

(d) Any party to any hearing conducted pursuant to subsections (b) and (c) of this section shall be accorded (1) the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of handicapped children, (2) the right to present evidence and confront, cross-examine, and compel the attendance of witnesses, . . . (4) the right to written findings of fact and decisions . . . .

(e)(1) A decision made in a hearing conducted pursuant to paragraph (2) of subsection (b) of this section shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (c) and paragraph (2) of this subsection. A decision made under subsection (c) of this section shall be final, except that any party may bring an action under paragraph (2) of this subsection.

(2) Any party aggrieved by the findings and decisions made under subsection (b) of this section who does not have the right to an appeal under subsection (c) of this section, and any party aggrieved by the findings and decision under subsection (c) of this section, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

20 U.S.C. § 1415 (1982). The Act guarantees all handicapped children a free appropriate public education "regardless of the severity of their handicap." 20 U.S.C. § 1412(2)(C) (1982). *See Rowley*, 458 U.S. at 202 n.23, where the Court states that the Act is intended to cover all children, "whatever the nature or severity of their handicap." Detailed regulations have been promulgated by the U.S. Department of Education to implement the statutory requirements. 34 C.F.R. §§ 300.500-300.589 (1984). In their turn, many state education agencies and local school districts have adopted their own regulations.

7. *See generally Rowley*, 458 U.S. at 182-84; HOUSE REPORT, *supra* note 2, at 14; Note, *Enforcing the Right to an "Appropriate" Education: The Education for All Handicapped Children Act of 1975*, 92 HARV. L. REV. 1103, 1104-13 (1974) [hereinafter cited as *Enforcement of Appropriate Education*]; Comment, *Board of Education v. Rowley: Handicapped Children are Entitled to a Beneficial Education*, 69 IOWA L. REV. 279, 285 (1983) [hereinafter cited as *Beneficial Education*]; Comment, *The Education for All Handicapped Children Act of 1975: What's Left After Rowley?*, 19 WILLAMETTE L.J. 715, 727-33 (1983) [hereinafter cited as *What's Left*].

8. 20 U.S.C. § 1415(b)(1)(E), (b)(2) (1982). *See supra* note 6. A parent may file a complaint to register disagreement with any aspect of the child's evaluation, programming, or placement. The complaint is filed with the school district. *Id.* at § 1415(a) (1982); 34 C.F.R. § 300.504(c), 300.506 (1984).

9. 20 U.S.C. §§ 1415(b)(2), 1415(c), (d) (1982); 34 C.F.R. § 300.506 (1984). *See supra* note 6.

10. In most states there are two levels of administrative review. The first level consists of a school district level administrative hearing presided over by a hearing officer. Many of the procedural trappings of civil trials are available, including counsel, cross-examination, and a verbatim record. 20 U.S.C. § 1415(d) (1982); 34 C.F.R. § 300.510 (1984).

Following the administrative hearing, an appeal may be taken to the state educational agency, which conducts an independent review. 20 U.S.C. § 1415(c) (1982); 34 C.F.R. § 300.510 (1984). *See supra* note 6. As an alternative to the two tier system, states may adopt a single tier system. 20 U.S.C. § 1415(b)(2) (1982); 34 C.F.R. § 300.506(b) (1984).

view is available in the appropriate state or federal district court.[11]

A surprising amount of litigation—most of it in the federal forum—has arisen under the Act.[12] Among the issues raised, the most nettlesome and difficult has been to glean, from what the Fifth Circuit Court of Appeals called "that undeniably delphic statute,"[13] the meaning of the core word "appropriate."[14] Courts initially attacked the issue from several perspectives.[15] They appeared to be approaching uniformity when the United States Supreme Court handed down its first decision interpreting the Act—*Board of Education v. Rowley*.[16] The *Rowley* decision did not resolve debate over the meaning of "appropriate" educational programming; however, it unquestionably altered the approach utilized in subsequent cases. In so doing, the decision had an important impact on programming for handicapped children.

In this article, an attempt is made to elucidate the concept of "appropriate" educational programming. To this end, the article begins with a description of the pre-*Rowley* approaches to the matter. This is followed by a brief discussion of the *Rowley* case itself. Next, the principal strands of post-*Rowley* case law are explored. In the last two sections, a methodology is offered by which "appropriateness" can be defined and assessed.

II. PRE-*ROWLEY* CASE LAW INTERPRETING "APPROPRIATE EDUCATION"

The requirement that every handicapped child receive an "appropriate" education is the heart of the Act, yet the statutory definition of the term gives precious little guidance on its substantive meaning. The definition, which "tends toward the cryptic rather than the comprehensive,"[17] is as follows:

> The term "free appropriate public education" means special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the state educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State

11. 20 U.S.C. § 1415(e) (1982); 34 C.F.R. § 300.511 (1984).

12. There have been hundreds of administrative hearings and scores of court decisions.

13. Tatro v. Texas, 703 F.2d 823, 826 (5th Cir. 1983), *aff'd in part, rev'd in part, sub nom.* Irving Indep. School Dist. v. Tatro, 104 S.Ct. 3371 (1984).

14. 20 U.S.C. § 1401(18) (1982). *See infra* text accompanying note 18 for the complete text of the definition. Every state receiving funds under the Act must have "in effect a policy that assures all handicapped children the right to a free appropriate public education." *Id.* at § 1412(1) (1982), *cited* in *Rowley*, 458 U.S. at 180-81; 34 C.F.R. § 300.4 (1984).

15. *See infra* text accompanying notes 86-142.

16. 458 U.S. 176 (1982).

17. *Id.* at 188.

> involved, and (D) are provided in conformity with the individualized education program required [by the Act].[18]

If readers come away from this definition unenlightened as to the meaning of an "appropriate public education," they may console themselves with the fact that many educators, judges, and parents are equally mystified. The statute simply does not establish a "substantive standard prescribing the level of education to be accorded handicapped children."[19] Rather, it leaves decision-making regarding individual children to parents and professionals.[20]

Congress was wise to eschew an all-pervasive substantive definition of "appropriate" special education.[21] In light of the unique needs and capabilities of handicapped children, such a definition is not practical. However, the standardless term "appropriate" must somehow be given substantive content, for it is through the meaning of this word that parents, educators, administrative hearing officers, and judges determine whether children are receiving the education required by the Act.

Prior to the Supreme Court's decision in *Rowley*, courts took several approaches in their efforts to inject substantive meaning into the word "appropriate."[22] At one extreme, they agreed that "[w]hatever the pre-

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18. 20 U.S.C. § 1401(18) (1982). *See* 34 C.F.R. § 300.4 (1984).

19. *Rowley*, 458 U.S. at 189.

20. It is apparent from the *Rowley* decision that a majority of the Supreme Court felt strongly that the federal judiciary should leave educational decision-making to local and state officials. The majority stated that:

> We previously have cautioned that courts lack the "specialized knowledge and experience" necessary to resolve "persistent and difficult questions of educational policy." San Antonio Independent School Dist. v. Rodriguez, 411 U.S. [1], at 42 [1973]. We think that Congress shared that view when it passed the Act. . . . Congress' intention was not that the Act displace the primacy of States in the field of education . . . .

458 U.S. at 208. Other authorities agree that proper deference to state decisions is important. In Battle v. Pennsylvania, 629 F.2d 269 (3d Cir. 1980), *cert. denied sub nom.* Scanlon v. Battle, 452 U.S. 968 (1981), the court stated "that the Act contemplates that the determination of appropriate educational goals, as well as the method of best achieving those goals, are matters which are to be established in the first instance by the states." *Id.* at 278. *See also* Note, *Education—Board of Education v. Rowley: The Supreme Court Takes a Conservative Approach to the Education of Handicapped Children*, 61 N.C.L. REV. 881, 901 (1983) [hereinafter cited as *Conservative Approach*]; Note, *Defining Appropriate Education for the Handicapped: The Rowley Decision*, 27 ST. LOUIS U.L.J. 685, 697-99 (1983) [hereinafter cited as *Defining Appropriate Education*].

21. In the *Rowley* decision, the Supreme Court, like Congress, avoided the temptation to promulgate a broad definition of appropriateness. The Court limited its opinion to the facts of the case before it. 458 U.S. at 202.

22. For compilation and discussion of the pre-*Rowley* cases see Adams, *Post Rowley: Direction from the Courts Regarding an "Appropriate" Education*, 12 EDUC. L. REP. (WEST) 212, 215-16 (1983); Zirkel, *Building an Appropriate Education from Board of Education v. Rowley: Razing the Door and Raising the Floor*, 42 MD. L. REV. 466, 472-73 (1983); Note, *Rowley: The Court's First Interpretation of the Education for All Handicapped Children Act of 1975*, 32 CATH. U.L. REV. 941, 950-53 (1983) [hereinafter cited as *Court's First Interpretation*]; Note, *Board of Education v. Rowley: Landmark Roadblock or Another Signpost on the Road to State Courts*, 16 CONN. L. REV. 149, 167 (1983); *Beneficial Education*, *supra* note 7, at 279-80; *Defining Appropriate Education*, *supra* note 20,

cise definition of 'free appropriate public education' is, the term certainly does *not* mean the *best* education possible."[23] On the other hand, they concurred that "a proposed program that would be detrimental to a handicapped child, causing him to stagnate or regress educationally or emotionally; is not appropriate."[24] With regard to severely handicapped children, they drew on a fairly clear legislative history for the conclusion that the Act requires "an opportunity to develop skills that would allow [them] to be as self-sufficient as possible and to function outside of an institution."[25]

Courts had substantial difficulty articulating a workable definition of "appropriate" programming for children who did not fit the self-sufficiency model. The interpretations that were offered were difficult to apply.[26] Difficulties arose for several reasons. First, judges frequently

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at 691-93; Note, *Education—Handicapped—Free Appropriate Public Education of Handicapped Children Requires Personalized Instruction and Support Services to Produce Beneficial Results But Does Not Require Reaching Full Potential of Handicapped Student*, 14 ST. MARY'S L.J. 425, 433-35 (1983); Note, *Board of Education v. Rowley: Defining Free Appropriate Public Education*, 24 S. TEX. L.J. 338, 342-47 (1983) [hereinafter cited as *Defining Free Appropriate Public Education*]; Note, *The Education for All Handicapped Children Act of 1975 Requires Beneficial, Not Equal, Educational Opportunity: Board of Education v. Rowley, 102 S.Ct. 3034 (1982)*, 14 TEX. TECH L. REV. 631, 634-40 (1983); Note, *Attack on the EHA: The Education for All Handicapped Children Act After Board of Education v. Rowley*, 7 U. PUGET SOUND L. REV. 183, 185-88 (1983); *What's Left*, *supra* note 7 at 718-21.

Several interpretations of the Act's requirement of an appropriate education did not receive wide acceptance. For example, in Note, *Education of Handicapped Children—The IEP Process and the Search for an Appropriate Education*, 56 ST. JOHN'S L. REV. 81, 111-12 (1981) the author suggests a standard based on the educational principle of normalization. Children are to be continuously moved to less restrictive, more "normal" settings. *Id.* In Grkman v. Scanlon, 528 F. Supp. 1032, 1035-36 (W.D. Pa. 1981), and Blomstrom v. Massachusetts Dep't of Educ., 532 F. Supp. 707, 713-14 (D. Mass. 1982), the courts espoused a form of "best interests of the child" approach.

23. Colin K. v. Schmidt, 536 F. Supp. 1375, 1386 (D.R.I. 1982) (emphasis in original). The Court's opinion contains a thorough summary of the cases decided up to that point on the issue of appropriateness.

24. *Id.* at 1387. *See Defining Appropriate Education*, *supra* note 20, at 700.

25. Stacey G. v. Pasadena Indep. Sch. Dist., 547 F. Supp. 61, 77 (S.D. Tex. 1982). *See* SENATE REPORT, *supra* note 4 at 9; HOUSE REPORT, *supra* note 4 at 11. *See also* Colin K. v. Schmidt, 536 F. Supp. 1375, 1386 (D.R.I. 1982); Campbell v. Talladega County Bd. of Educ., 518 F. Supp. 47, 54 (N.D. Ala. 1981); Rettig v. Kent City School Dist., 539 F. Supp. 768, 777 (N.D. Ohio 1981); Armstrong v. Kline, 476 F. Supp. 583, 604 (E.D. Pa. 1979), *aff'd on other grounds sub nom.* Battle v. Pennsylvania, 629 F.2d 269 (3d Cir. 1980), *cert. denied*, 452 U.S. 968 (1981); *Beneficial Education*, *supra* note 7 at 280. In *Defining Appropriate Education*, *supra* note 20, the author noted that the self-sufficiency standard "requires that the educational program be calculated to allow the child the opportunity to handle himself without the aid of others, within the confines of his handicap." *Id.* at 692. *See also* Comment, *Self-Sufficiency Under the Education for All Handicapped Children Act: A Suggested Judicial Approach*, 1981 DUKE L.J. 516.

In *Rowley* the Supreme Court rejected the self-sufficiency standard. 458 U.S. at 201 n.23. *See* Judge Mansfield's dissent in Rowley v. Board of Educ., 632 F.2d 945, 952 (2d Cir. 1980), where he discusses and adopts the self-sufficiency standard.

26. The *Rowley* trial court agreed that the substantive standard it applied called for difficult measurements. However, it felt the standard was required by the Act. Rowley v. Board of Educ.,

regarded the Act as requiring equality of educational opportunity for handicapped children.[27] Analysis based on concepts of equal protection necessitated difficult comparisons between educational programs for handicapped and nonhandicapped children.[28] Second, in interpreting the Act's requirement, courts often relied on regulations promulgated under a section of a different statute. Section 504 of the Rehabilitation Act of 1973 prohibits discrimination against the handicapped by recipients of federal funds,[29] including public schools.[30] The regulations adopted under this section define "appropriate education" to include programming "designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met."[31] It is understandable that courts grasped this seemingly clear pronouncement of the word "appropriate."[32] As was true with the equal protection analysis, however, the 504 regulations required difficult comparisons between handicapped and nonhandicapped children. Finally, the fact that Congress chose not to give substantive meaning to the central term of the Act tempted courts to enter an arena quite foreign to them—determina-

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483 F. Supp. 528, 534 (S.D.N.Y. 1980), *aff'd*, 632 F.2d 945 (2d Cir. 1980), *rev'd*, 458 U.S. 176 (1982).

27. *See, e.g.*, Rowley v. Board of Educ., 483 F.Supp. 528 (S.D.N.Y. 1980), where the district court observed that "Equal Protection decisions . . . motivated the passage of the Act." *Id.* at 534. The equal protection approach is understandable in light of the legislative history, which stresses equality of educational opportunity. *See Rowley*, 458 U.S. at 212-14 (White, J., dissenting). *See also Defining Free Appropriate Public Education*, *supra* note 22 at 345-47.

28. *See supra* note 26.

29. Section 504, which is codified at 29 U.S.C. § 794 (1982), reads in relevant part as follows:

> No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

Id.

30. Virtually all public school systems in the country receive federal funds. Subpart D of the Section 504 regulations sets forth detailed requirements to be met by local education agencies. 45 C.F.R. pt. D §§ 84.31-.38 (1984). For instance, 45 C.F.R. pt. D § 84.33(a) (1984), requires schools to "provide a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction, regardless of the nature or severity of the person's handicap." The regulations go on to clarify the meaning of an "appropriate" education as follows:

> (b) Appropriate education. (1) For the purpose of this subpart, the provision of an appropraite [sic] education is the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met . . . .

Id. at § 84.33(b) (1984).

31. 45 C.F.R. § 84.33(a) (1984). *See supra* note 30.

32. The *Rowley* trial court sought guidance from the Section 504 regulations. *See* 483 F. Supp. at 533. The Supreme Court disapproved of the lower court's reliance on Section 504. *Rowley*, 458 U.S. at 186 n.8.

tion of the relative merit of competing educational methodologies.[33]

Despite these obstacles, courts attempted to delineate the meaning of an "appropriate" education. The direction of the case law was described by one court[34] as follows: "Some courts have stated that a free appropriate education is one that provides each handicapped child an opportunity for achieving his potential commensurate with that provided nonhandicapped children."[35] This so-called "equal opportunity standard" was employed in several decisions,[36] including the trial court opinion in the *Rowley* litigation. Until the Supreme Court's decision, it appeared to be gaining ascendance as the standard of choice.[37]

The trial court opinion in the *Rowley* litigation became a leading exposition of the equal opportunity standard. Before embracing the standard, the court analyzed and rejected two alternative approaches. The court wrote that "[a]n 'appropriate education' could mean an 'adequate' education—that is, an education substantial enough to facilitate a child's progress" toward individualized educational goals.[38] This "minimalist" approach was rejected as inconsistent with the spirit of the Act. "On the other hand, since even the best public schools lack the resources to enable every child to achieve his full potential," a standard pegged at maximum achievement was also rejected.[39] The court stated that:

> Between those two extremes . . . is a standard which . . . is more in keeping with the regulations, with the Equal Protection decisions which motivated the passage of the Act, and with common sense. This standard would require that each handicapped child be given an opportunity to achieve his full potential commensurate with the opportunity provided to other children.[40]

The court admitted that this standard had problems:

> The difficulty with the standard, of course, is that it depends on a number of different measurements which are difficult to make. It re-

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33. *See* Stark, *Tragic Choices in Special Education: The Effect of Scarce Resources on the Implementation of Pub. L. No. 94-142*, 14 CONN. L. REV. 477, 498-504 (1982).

34. Colin K. v. Schmidt, 536 F. Supp. 1375 (D.R.I. 1982).

35. Id. at 1386.

36. *See supra* note 25 and authorities cited therein.

37. *See* Springdale School Dist. No. 50 v. Grace, 656 F.2d 300, 305 (8th Cir. 1981), *vacated and remanded* for consideration in light of *Rowley*, 458 U.S. 1118 (1982), *aff'd on other grounds*, 693 F.2d 41 (8th Cir. 1982), *cert. denied*, 461 U.S. 927 (1983); Espino v. Besteiro, 520 F. Supp. 905, 913 (S.D. Tex. 1981); Hines v. Pitt County Bd. of Educ., 497 F. Supp. 403, 406 (E.D.N.C. 1980); Buchholtz v. Iowa Dep't of Pub. Instruction, 315 N.W.2d 789, 793 (Iowa 1982). *See supra* note 22 and authorities cited therein.

In *Rowley* the Supreme Court emphatically rejected the lower court's "equal opportunity standard." Justice Rehnquist, writing for the Court, took pains to reject it on at least five occasions during the course of his opinion. *See* 458 U.S. at 184-90, 197 n.21, 198, 200, 204 n.26.

38. 483 F. Supp. at 534.

39. *Id.*

40. *Id. See supra* note 37 and authorities cited therein.

> quires that the potential of the handicapped child be measured and compared to his or her performance, and that the resulting differential or "shortfall" be compared to the shortfall experienced by non-handicapped children.[41]

Despite these difficulties, the court concluded that the "equal opportunity standard" was required by the Act. Eventually, the Supreme Court rejected the lower court's approach, describing it as "an entirely unworkable standard requiring impossible measurements and comparisons."[42]

The pre-*Rowley* courts, operating in a substantive vacuum, struggled to give meaning to the Act's "delphic" requirement that every child receive an "appropriate" education. The case law evidenced a strong equal protection flavor, giving voice to a perceived Congressional intent to open schoolhouse doors to the handicapped and accord them educational opportunities on a par with those offered nonhandicapped children. With the Supreme Court's decision in *Board of Education v. Rowley*,[43] the equal opportunity approach met its demise.

III. THE *ROWLEY* DECISION

The Supreme Court's *Rowley* decision has had—at one and the same time—minimal and far-reaching impacts on special education. Amy Rowley attended school in Peekskill, New York. When the litigation commenced, she was a first grader. Amy is hearing impaired. She has above average intelligence and is an excellent lip reader. Due to her intelligence, interest, and friendly personality, she did well in school; achieving above average marks, and advancing easily from grade to grade. From her initial enrollment, the school district responded to her unique needs, providing a specialized hearing aid, assistance from a tutor for the deaf, and speech therapy three hours a week.[44] Amy's parents

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41. 483 F. Supp. at 534.

42. *Rowley*, 458 U.S. at 198. *See Beneficial Education*, *supra* note 7, where the author agrees that the equal opportunity standard would be difficult to apply. The author states that:

> [T]he Court's rejection of the district court's standard is desirable because the comparison-of-opportunity standard is difficult to apply and is not appropriate in all cases. Testing procedures that accurately measure the learning potential of all handicapped children have not been developed. Moreover, the handicaps of some children may interfere with the administration of tests that are available, and thereby make the reliability of results questionable. Finally, in the case of an intellectually impaired child, a comparison with nonhandicapped children is impossible because there is no nonhandicapped child whose intellectual capacity or potential is similar to that of the handicapped child. As a result, although the district court's comparison-of-opportunity standard was particularly suitable in *Rowley* because Amy was not intellectually impaired, the standard is not appropriate in all cases.

Id. at 290-91 (footnotes omitted).

43. 458 U.S. 176 (1982).

44. The facts of the case are discussed at 458 U.S. at 184-86. The educators working with Amy had been diligent in their efforts to provide her with the support services needed for her to succeed in the regular education classroom. The tenor of the Court's opinion reveals that the Justices were

agreed with these services, "but insisted that Amy also be provided a qualified sign-language interpreter in all her academic classes."[45] The school balked at this demand, and the Rowleys requested a due process hearing. The hearing officer found that Amy's program met her needs, and that an interpreter was not necessary. The New York Commissioner of Education affirmed the hearing officer's decision.[46]

Their administrative remedies exhausted, the Rowleys commenced an action in federal court, alleging that their daughter was denied an "appropriate" education.[47] The trial court concluded that Amy was a "remarkably well-adjusted child who interacts and communicates well with her classmates and has developed an extraordinary rapport with her teachers."[48] Compared to her nonhandicapped classmates, however, she understood much less of what was occurring in the classroom.[49] The disparity between her potential and her achievement led the court to hold that she was not receiving an "appropriate" education.[50] Without an interpreter, she was denied an "opportunity to achieve [her] full potential commensurate with the opportunities provided to other children."[51] The Court of Appeals affirmed.[52] Some five years after the initial disagreement over Amy's individualized education program (IEP), the Supreme Court decided the case.[53]

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impressed with the efforts made on Amy's behalf. *See also* Rowley v. Board of Educ., 632 F.2d 945, 949-51 (2d Cir. 1980) (Mansfield, J., dissenting).

45. *Rowley*, 458 U.S. at 184.

46. *Id.* at 185.

47. *Id.*

48. *Rowley*, 483 F. Supp. at 531.

49. *Rowley*, 458 U.S. at 185-86.

50. *Id. quoting* 483 F. Supp. at 534.

51. *Id.*

52. Rowley v. Board of Educ., 632 F.2d 945 (2d Cir. 1980), *rev'd*, 458 U.S. 176 (1982). The Second Circuit's brief per curiam opinion was strictly limited to its facts. The court stated that "our decision is limited to the unique facts of this case and is not intended as authority beyond this case." *Id.* at 948 (footnote omitted). The court stated in a footnote that its decision was to carry no precedential weight. *Id.* at 948 n.7.

Judge Mansfield filed a strong dissenting opinion. He argued that the district court erred in relying on Section 504 of the Rehabilitation Act of 1973 and its regulations. He disagreed strongly with the substantive standard adopted by the lower court, commenting that: "The definition of 'appropriate' education adopted by the district court, moreover, is unfeasible and imposes a standard that is impractical, if not impossible, to use as a means of evaluating the appropriateness of a handicapped child's education." *Rowley*, 632 F.2d at 952 (Mansfield, J., dissenting). Judge Mansfield favored adoption of a standard tied to self sufficiency. *Id.* at 953. The self sufficiency standard was eventually rejected by the Supreme Court. *See Rowley*, 458 U.S. at 201-02 n.23.

53. The IEP which was challenged in the District Court was for the 1978-79 school year. 458 U.S. at 186 n.9. The school district argued in the Supreme Court "that the District Court erred in reviewing that IEP after the school year has ended and before the school administrators were able to develop another IEP for subsequent years." *Id.* The Court rejected this position and held that a reviewing court retains jurisdiction to grant relief pertaining to an IEP that is no longer in effect due

Writing for the majority, Justice Rehnquist articulated two issues: "What is meant by the Act's requirement of a 'free appropriate public education' . . . , [a]nd what is the role of state and federal courts in exercising the review granted by [the Act]?"[54]

A. *The Meaning of an "Appropriate" Education*

The Court began its analysis with the statutory definition.[55] While the definition did not resolve the difficult question presented by the case, it provided some guidance. An "appropriate" education, wrote the Court, "consists of educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child 'to benefit' from the instruction."[56] Instruction and services had to be "provided at public expense and under public supervision, meet the State's educational standards, approximate the grade levels used in the State's regular education, and comport with the child's IEP."[57]

The key word in the Court's analysis is "benefit." So long as a child's program is educationally beneficial, he or she receives an "appropriate" education.[58] Unfortunately, the functional meaning of "benefit" is nearly as opaque as "appropriate." What is educational "benefit"? How much "benefit" does the Act require? How is it measured? The Court found that the statute did not contain a "substantive standard pre-

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to the passage of time "because the alleged deficiencies in the IEP were capable of repetition as to the parties before it yet evading review." *Id.*

54. *Id.* at 186.

55. The Act defines "free appropriate public education" as follows:

> The term "free appropriate public education" means special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title.

20 U.S.C. § 1401(18) (1982). The terms "special education" and "related services" are also defined in the Act. "Special education" means "specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions." *Id.* at § 1401(16) (1982).

"Related services" are defined as follows:

> The term "related services" means transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education, and includes the early identification and assessment of handicapping conditions in children.

Id. at § 1401(17) (1982).

56. *Rowley*, 458 U.S. at 188-89.

57. *Id.* at 189.

58. *Id.*

scribing the level of"[59] educational benefit required to satisfy the Act; therefore, it turned to the legislative history for guidance. The majority placed great emphasis on what it perceived as a legislative intent to open the doors of public education to handicapped children—to provide access to educational services. In the Court's view, Congress was concerned more with providing "some" services to all than with guaranteeing a particular level of quality or quantity.[60] So long as programming was individualized and "meaningful", the Act was satisfied.[61] But here again, the word "meaningful" is far from helpful in deciding cases.

While the Court did not describe the level of educational programming required to satisfy its "benefit" test, it took pains to reject standards utilized in lower court decisions. The majority stated that "the language of the statute contains no requirement . . . that States maximize the potential of handicapped children 'commensurate with the opportunity provided to other children.' "[62] Thus, it rejected the equal opportunity standard utilized by the trial court.[63] It also foreswore a standard tied to achievement of self-sufficiency.[64] "Because many mildly handicapped children will achieve self-sufficiency without state assistance while personal independence for the severely handicapped may be an unreachable goal, 'self-sufficiency' as a substantive standard is at once an inadequate protection and an overly demanding requirement."[65] Eschewing these standards, the Court articulated what it perceived as the " 'basic floor of

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59. *Id.*

60. The majority opinion summarized the legislative history as follows:

> By passing the Act, Congress sought primarily to make public education available to handicapped children. But in seeking to provide such access to public education, Congress did not impose upon the States any greater substantive educational standard than would be necessary to make such access meaningful.

Id. at 192.

The Court's one-sided perspective on the Act's legislative history has been universally condemned as inaccurate. In his concurring opinion, Justice Blackmun stated that he "read the legislative history and goals of the Education of the Handicapped Act differently. Congress unambiguously stated that it intended to 'take a more active role under its responsibility for equal protection of the laws to guarantee that handicapped children are provided *equal educational opportunity*.' " (citation omitted). *Rowley*, 458 U.S. at 210 (Blackmun, J., concurring).

In his dissent, Justice White accused the majority of contradicting the legislative history. *Id.* at 212 (White, J., dissenting). After reviewing the history, Justice White stated that "[t]he legislative history thus directly supports the conclusion that the Act intends to give handicapped children an educational opportunity commensurate with that given other children." *Id.* at 214. *But cf.* Note, *Crippling the Education For All Handicapped Children Act*, 12 STETSON L. REV. 790, 793-99, 807-13 (1983). *See also supra* note 22 and authorities cited therein.

61. *See Rowley*, 458 U.S. at 192.

62. *Id.* at 189-90 (citation omitted).

63. As mentioned at note 37, *supra*, the majority was emphatic in its rejection of the lower court's substantive standard.

64. 458 U.S. at 201 n.23.

65. *Id.* at 202 n.23.

opportunity' provided by the Act."[66] Every handicapped child must be afforded access to specialized instruction and related services which are individually designed to provide educational benefit.

In the final analysis, the Court's solution is less than satisfactory. Little guidance is offered on the crucial question of how "benefit" is to be assessed and measured. We know that an "appropriate" program must be beneficial, but the opinion offers very little assistance in determining when the standard is satisfied. Justice Rehnquist doubtless realized that his "benefit" test left many unanswered questions. He wrote of the difficulty of articulating "any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act."[67] With this difficulty in mind, he confined his analysis to the facts of the case at hand, concluding that Amy Rowley was receiving the "benefit" required under the Act.[68] In doing so, he stated that for Amy, and other handicapped children educated in the regular classroom, the principal device for measurement of benefit is the normal system of academic grades and promotion. As long as a student's individualized program is "reasonably calculated to enable the child to achieve passing marks and advance from grade to grade," the system monitors itself to foster "educational progress," that is, "benefit."[69]

Rowley's benefit test is comprehensible in the context of handicapped children educated in the regular classroom. In such cases the existing assessment system provides a reasonably reliable measurement tool.[70] For the thousands of handicapped children who are not educated in the regular classroom, however, the benefit test is not very helpful. Again, what is "benefit"? How much is enough? How is it to be assessed? *Rowley* simply does not answer these crucial questions.

B. *The Role of the Courts*

As stated above, the Act authorizes judicial review of agency decisions. The reviewing court receives the record of the administrative proceedings, hears additional evidence at the request of either party, and grants appropriate relief.[71] Amy's parents argued that the Act mandated de novo judicial review of state administrative decisions and policies.[72] The school district sought to limit review to questions of compliance with the procedures set forth in the Act. It argued that courts have "no

66. *Id.* at 201.
67. *Id.* at 202.
68. *Id.* at 203 n.25.
69. *Id.* at 203-04.
70. *Id.*
71. 20 U.S.C. § 1415 (e) (1982).
72. *Rowley*, 458 U.S. at 205.

power to review the substance of the state program."[73] Rejecting both positions, the Supreme Court held that "a court's inquiry . . . is two-fold. First, has the state complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?"[74]

The Court emphasized the importance of compliance with procedural requirements, especially the requirement of parental involvement in formulating individualized education programs.[75] The majority felt that compliance with these requirements would lead to "appropriate" programming in most cases.[76] Commenting on judicial review of the substantive adequacy of programs, the Court reminded lower courts that judges "lack the 'specialized knowledge and experience' necessary to re-

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73. *Id.*

74. *Id.* at 206-07. The *Rowley* Court rejected de novo judicial review. Cases decided after *Rowley* disagree on the scope of judicial review. In Colin K. v. Schmidt, 715 F.2d 1, 5 (1st Cir. 1983), the court remarked that "the Supreme Court has indicated that the court's review is to be something short of a complete de novo review . . . ." Taking a different approach, the court in Roncker v. Walter, 700 F.2d 1058, 1062 (6th Cir. 1983), stated "that the standard of review as set out in Rowley requires a de novo review but that the district court should give due weight to the state administrative proceedings in reaching its decision." *But cf.* Age v. Bullitt County Public Schools, 673 F.2d 141, 144 (6th Cir. 1982) ("It nonetheless is evident that Congress intended the federal district court to make an independent determination of the appropriateness of the placement of the child."). *See What's Left*, *supra* note 7 at 723-33, for the view that the *Rowley* Court misconstrued Congress' intent by restricting judicial review.

Whatever the eventual resolution of the "de novo" "non-de novo" controversy, the post-*Rowley* cases clearly reveal that courts continue to exercise broad authority to inquire into the merits of cases. *See infra* authorities collected in Section IV, at pp. 116-27 *infra*.

75. *Rowley*, 458 U.S. at 208-09.

76. *Id.* at 206. The Court felt "that adequate compliance with the procedures prescribed [by the Act] would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP." *Id.* The Court's heavy reliance on the procedures established by the Act as a mechanism to assure appropriate programming is probably misplaced. The author of an excellent student Comment criticizes the Court's analysis in this way:

> The Court's deferential approach is based on the assumption that compliance with procedure will guarantee that a program developed for a handicapped child is designed to meet the child's unique needs. This assumption, however, may be unwarranted. Because of limited funding, school authorities that develop educational programs may focus on services that already exist within the school system rather than on the unique needs of the child as required by the EAHCA. Although parents are guaranteed participation in the development of the IEP and have the right to a due process hearing, these procedural protections are not sufficient, by themselves, to insure that the educational programs of handicapped children are individualized. At the IEP meeting the only persons present may be the teacher, the parent, and the educational agency representative. Because the agency representative and teacher work together, they may have the same educational philosophy, and the representative is likely to endorse the program developed by the teacher because the representative is the teacher's superior. In addition, parents may be unable to evaluate effectively the teacher's proposed plan and may have difficulty articulating the reasons in support of their modifications. Thus, there is a "bargaining imbalance," which jeopardizes the parents' ability to guarantee that their child's education is individualized.

Beneficial Education, *supra* note 7, at 286-87 (footnotes omitted).

solve 'persistent and difficult questions of educational policy.' "[77] Courts are not "to substitute their own notions of sound educational policy for those of the school authorities which they review."[78] In the final analysis, Congress intended to leave educational decision-making to local authorities.[79]

With these cautionary remarks in mind, the Court approved a form of substantive judicial review. It held that reviewing courts must ascertain whether a program is "reasonably calculated to enable the child to receive educational benefits?"[80] If so, the court can require no more. If not, it may order additional programming needed to elevate the child's program to the basic floor of opportunity required by the Act. It is readily apparent that the Court sought to restrict the scope of judicial review and limit what it perceived as unwarranted intervention into state and local prerogatives. The message is clear: if a dispute over programming concerns a choice between competing educational theories, both of which meet the benefit test, judges must defer to the judgment of educators.

In a strident dissent, Justice White attacked the majority. To his eye "the majority opinion contradicts itself, the language of the statute, and

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77. 458 U.S. at 208 (citation omitted).

78. *Id.* at 206. While courts are not to substitute their judgment for that of educators, "[t]he legislative history of the Act makes . . . apparent the intent of Congress that the reviewing court is not required to defer to the findings of the administrative agencies." Age v. Bullitt County Public Schools, 673 F.2d 141, 144 (6th Cir. 1982). While *Age* is a pre-*Rowley* case, it is probably still good law insofar as it refers to determination of factual questions.

79. The Court stated that:

> In assuring that the requirements of the Act have been met, courts must be careful to avoid imposing their view of preferable educational methods upon the States. The primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child's needs, was left by the Act to state and local educational agencies in cooperation with the parents or guardian of the child.
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> It is clear that Congress was aware of the States' traditional role in the formulation and execution of educational policy. "Historically, the States have had the primary responsibility for the education of children at the elementary and secondary level."

Rowley, 458 U.S. at 207-08 and n.30 (citation omitted).

While no one can deny the tradition of local control over education, the dissenting Justices' view that reviewing courts should have a broader role than was approved by the majority is understandable. The very statistics relied upon by the majority as justification for the Act proved beyond a doubt that many local educational authorities had been doing a miserable job of carrying out their responsibility to educate the handicapped. The Senate Report indicates that Congress intended to "take a more active role" in ensuring that handicapped children were afforded "equal educational opportunity." SENATE REPORT, *supra* note 4, at 9. *See Rowley*, 458 U.S. at 210 (Blackmun, J., concurring). This active role is evidenced in the Act's authorization of judicial review. *See* 20 U.S.C. § 1415(e) (1982). *See Enforcement of Appropriate Education*, *supra* note 7, at 1107-08. The Supreme Court's restrictive reading of the judicial review provisions runs counter to congressional intent expressed in the legislative history. *See Beneficial Education*, *supra* note 7, at 288-89; *Conservative Approach*, *supra* note 20, at 895-97.

80. *Rowley*, 458 U.S. at 207.

the legislative history."[81] While he agreed "that the language of the Act does not contain a substantive standard beyond requiring that the education offered must be 'appropriate,' "[82] he differed sharply over the meaning of the legislative history. He described the basic floor of opportunity in terms similar to those employed by the lower courts,[83] writing that Congress "intended to eliminate the effects of the handicap, at least to the extent that the child will be given an equal opportunity to learn."[84] He also disagreed with the majority's interpretation of the scope of judicial review. In his view, the Act was designed to allow a "full and searching [judicial] inquiry into any aspect of a handicapped child's education."[85] To this end, he believed Congress intended courts to consider each case de novo. Justice White's dissent forcefully demonstrates the somewhat strained analysis of the majority. Seeking to curtail intervention in matters traditionally left to the states, the majority may well have distorted Congressional intent. Be that as it may, the benefit test is now the law, and educators, parents, and judges must struggle to implement it. To understand how the courts have done so in the three years since *Rowley*, the next section analysizes the post-*Rowley* case law.

IV. Case Law Developments After *Rowley*

Review of post-*Rowley* cases discloses interesting and important developments. Several of the principles enunciated by the Supreme Court have been followed faithfully. For example, questions of educational policy are left to education officials.[86] Courts do not order schools to provide the best possible education or to maximize potential.[87] On the other

81. *Id.* at 212 (White, J., dissenting). Justice Blackmun concurred in the judgment and wrote separately. He opined that the Act's substantive requirement of an appropriate education necessitated asking "whether Amy's program, *viewed as a whole*, offered her an opportunity to understand and participate in the classroom that was substantially equal to that given her nonhandicapped classmates. This is a standard predicated on equal educational opportunity and equal access to the educational process." *Id.* at 211 (Blackmun, J., concurring) (emphasis in original).

82. *Id.* at 213 (White, J., dissenting).

83. *Id.* at 218.

84. *Id.* at 215.

85. *Id.* at 218.

86. *See, e.g.*, Rettig v. Kent City School Dist., 720 F.2d 463, 466 (6th Cir. 1983) ("The courts . . . are not free to choose between competing educational theories and impose that selection upon the school system."); Grkman v. Scanlon, 528 F. Supp. 1032 (W.D. Pa. 1981), *vacated and remanded*, 707 F.2d 1391 (3d Cir. 1983), *decision on remand*, 563 F. Supp. 793 (W.D. Pa. 1983).

87. *See, e.g.*, Georgia A.R.C. v. McDaniel, 716 F.2d 1565, 1570-71 (11th Cir. 1983), *vacated and remanded*, 104 S.Ct. 3581 (1984), *decision on remand*, 740 F.2d 902 (11th Cir. 1984); Monahan v. Nebraska, 687 F.2d 1164, 1170 (8th Cir. 1982) (The Act "is primarily a procedural statute . . . . It does impose a substantive duty, but only to afford an adequate education, not necessarily the kind of education necessary to maximize each handicapped child's personal development."); McKenzie v. Jefferson, 566 F. Supp. 404, 407 (D.D.C. 1983) (A State "is under no obligation to place and fund the child in the *best* appropriate placement; its only obligation under [the Act] is to place the child in

hand, courts exercise careful scrutiny to ensure that the procedural requirements of the Act are satisfied.[88] In particular, they demand that children receive individually tailored education plans.[89] Finally, courts agree that the Act creates enforceable procedural and substantive rights.[90] In addition to the foregoing, *Rowley* influenced three important strands of case law which began developing prior to the Supreme Court's decision. These are disputes over residential placement, controversies

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an appropriate placement.") (emphasis in original). *See* Adams Central School Dist. v. Deist, 215 Neb. 284, 338 N.W.2d 591 (1983), *cert. denied*, 104 S.Ct. 239 (1984). The Nebraska court adopted the educational benefit test articulated in *Rowley*. It is interesting to note that in an earlier opinion in the same litigation, the Nebraska court adopted a substantive standard under which every handicapped child was entitled to an opportunity to achieve his or her full potential commensurate with the opportunity afforded nonhandicapped children. When *Rowley* came down, the State court abandoned the full potential standard and embraced the *Rowley* benefit analysis. The earlier opinion is Adams Central School Dist. v. Deist, 214 Neb. 307, 334 N.W. 2d 775 (1983).

88. *See, e.g.*, Georgia A.R.C. v. McDaniel, 716 F.2d 1565 (11th Cir. 1983), *vacated and remanded*, 104 S.Ct. 3581 (1984), *decision on remand*, 740 F.2d 902 (llth Cir. 1984).

89. *See, e.g.*, Yaris v. Special School Dist. of St. Louis County, 558 F. Supp. 545, 558 (E.D. Mo. 1983) ("The IEP guarantees the handicapped child, procedurally and substantively, a free appropriate education.") All of the extended year programming cases emphasize the importance of the IEP. *See* Georgia A.R.C. v. McDaniel, 716 F.2d 1565 (11th Cir. 1983); Crawford v. Pittman, 708 F.2d 1028 (5th Cir. 1983).

90. *See, e.g.*, Tatro v. Texas, 703 F.2d 823 (5th Cir. 1983), *aff'd in part, rev'd in part, sub nom.* Irving Indep. School Dist. v. Tatro, 104 S.Ct. 3371 (1984). The school district argued that the Supreme Court's holding in Pennhurst State School & Hospital v. Halderman, 451 U.S. 1 (1981), required the *Tatro* court to rule that "federal statutes that grant funds to state programs cannot be read to confer judicially enforceable substantive rights on the program's beneficiaries." 703 F.2d at 826 n.2. The court rejected the argument and remarked that the Act "creates enforceable rights to 'special education and related services.'" *Id.*

The *Rowley* Court held that the Act creates enforceable rights. 458 U.S. at 199-203. Two important post-*Rowley* cases agree that the Act creates enforceable rights. In Georgia A.R.C. v. McDaniel, 716 F.2d 1565 (11th Cir. 1983), the State of Georgia argued that the *Pennhurst* case precluded a ruling that the Act required extended year programming for severely handicapped children. The Circuit Court rejected this argument. It found that the statute was flexible enough to include such programming. "[A] state accepting federal funds under the Act should be fully aware of the requirement of providing individualized education to each handicapped child . . . ." *Id.* at 1577-78. Since some children require extended year programming in order to benefit from their education, the requirement is within the flexible requirement of an appropriate education. *See also* Crawford v. Pittman, 708 F.2d 1028, 1036 (5th Cir. 1983); Gladys J. v. Pearland School Dist., 520 F. Supp. 869, 873 (S.D. Tex. 1981); John A. v. Gill, 565 F. Supp. 372 (N.D. Ill. 1983); *Court's First Interpretation, supra* note 22.

On a related point, in Darlene L. v. Ill. State Board of Educ., 568 F. Supp. 1340 (N.D. Ill. 1983), the court decided whether residential care in a psychiatric treatment facility was a related service as defined in the Act. *See* 20 U.S.C. § 1401(17) (1982); 34 C.F.R. § 300.13 (1984). The court relied on *Pennhurst* for the proposition that the Act was primarily a funding statute. That being so, states were only required to provide services explicitly set forth in the Act. Since psychiatric residential care was not set forth, the school district had no statutory obligation to provide it. The court stated that "Courts may not expansively interpret provisions of funding statutes such as the EHA to require states to provide any services which are not explicitly required by the statute." *Darlene L.*, at 1345. *See also* McKenzie v. Jefferson, 566 F. Supp. 404 (D.D.C. 1983) (A school district is not responsible for psychiatric hospitalization). *But see* Max M. v. Thompson, 592 F. Supp. 1437, 1444 (M.D. Ill. 1984) ("Psychotherapy . . . appears to be a required related service.")

concerning the least restrictive placement, and extended school year cases. These developments are discussed below.

A. *Residential Placement Cases*

The Act requires school districts to create a continuum of educational placements, including "instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions."[91] Such a continuum is necessary because the unique needs of handicapped children require flexible placement alternatives.[92] In particular, some severely handicapped children benefit from programming only when educated in an institutional setting.[93] Such programming is often expensive, and school districts struggling with limited budgets are loath to approve it.[94] Parents, on the other hand, may see such programming as the only hope in a desperate situation. The stage is set for confrontation, and numerous pre- and and post-*Rowley* cases have been litigated on this front.[95]

There has been a substantial number of post-*Rowley* residential placement cases.[96] *Abrahamson v. Hershman*[97] is representative of the approach taken by the courts. The case involved a dispute over placement of a low functioning mentally retarded child with autistic-like

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91. 34 C.F.R. § 300.551(b)(1) (1984).

92. *See generally* Miller & Miller, *The Handicapped Child's Civil Rights as it Relates to the "Least Restrictive Environment" and Appropriate Mainstreaming*, 54 IND. L.J. 1 (1978).

93. The regulations and the Act acknowledge this. *See* 34 C.F.R. § 300.551 (1984); 20 U.S.C. § 1412(5)(B) (1982).

94. Educators may consider cost when choosing between programs. *See* Roncker v. Walter, 700 F.2d 1058, 1063 (6th Cir. 1983).

95. There are many pre-*Rowley* residential placement cases. *See, e.g.*, Christopher T. by Brogna v. San Francisco Unified School Dist., 553 F. Supp. 1107 (N.D. Cal. 1982); Stacey G. by William and Mary G. v. Pasadena Ind. School Dist., 547 F. Supp. 61 (S.D. Tex. 1982); San Francisco Unified School Dist. v. State, 131 Cal. App. 3d 54, 182 Cal. Rptr. 525 (1982). *See generally* Mooney & Aronson, *Solomon Revisited: Separating Educational and Other Than Educational Needs in Special Education Residential Placements*, 14 CONN. L. REV. 531 (1982). A reply to this article is found in Stoppleworth, *Mooney & Aronson Revisited: A Less than Solomon-Like Solution to the Problem of Residential Placement of Handicapped Children*, 15 CONN. L. REV. 757 (1983).

96. *See* Clevenger v. Oak Ridge School Bd. 744 F.2d 514 (6th Cir. 1984); Matthews v. Davis, 742 F.2d 825 (4th Cir. 1984); Colin K. v. Schmidt, 715 F.2d 1 (1st Cir. 1983); Abrahamson v. Hershman, 701 F.2d 223 (1st Cir. 1983); Hessler v. State Bd. of Educ., 700 F.2d 134 (4th Cir. 1983); Doe v. Anrig, 692 F.2d 800 (1st Cir. 1982); Ahern v. Keene, 593 F. Supp. 902 (D. Del. 1984); Geis v. Board of Educ., 589 F. Supp. 269 (D.N.J. 1984); William S. v. Gill, 572 F.Supp. 509 (N.D. Ill. 1983); Darlene L. v. Ill. State Bd. of Educ., 568 F. Supp. 1340 (N.D. Ill. 1983); Cothern v. Malloy, 565 F. Supp. 701 (W.D. Mo. 1983); John A. v. Gill, 565 F.Supp. 372 (N.D. Ill. 1983); Cain v. Yukon Pub. School Dist., 556 F.Supp. 605 (W.D. Okla. 1983); Lang v. Braintree School Comm., 545 F. Supp. 1221 (D. Mass. 1982); Adams Central School Dist. v. Deist, 214 Neb. 307, 334 N.W.2d 775 (1983), *modified*, 215 Neb. 284, 338 N.W.2d 591 (1983); Murphy v. Pennsylvania Dept. of Educ., 460 A.2d 398 (Pa. Commw. 1983).

97. 701 F.2d 223 (1st Cir. 1983).

symptoms. His parents sought a residential placement that would provide continuity of programming twenty-four hours a day. The school district proposed a day program. The parents lost both levels of administrative review, and commenced an action in federal court. The district court reversed the administrative decisions and ordered residential placement.[98] The First Circuit Court of Appeals affirmed.

The *Abrahamson* court began its analysis with an important observation pertaining to education of seriously handicapped children. It wrote that "the concept of education is necessarily broad with respect to some severely or profoundly retarded children."[99] With this consideration in mind, the court drew on the teaching of *Rowley* to determine which program to approve. It wrote that "the Act does not authorize residential care merely to enhance an otherwise sufficient day program."[100] Residential programming is required only when necessary to enable the child to achieve "any educational progress."[101] Put another way, as between two programs, each of which provides educational benefit, courts must respect educators' choices. Educators may opt for the less beneficial of two "appropriate" programs, and they may consider cost in reaching a decision.[102] The only significant limitations on deci-

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98. *Id.* at 226.

99. *Id.* at 228 (quoting Kruelle v. New Castle County School Dist., 642 F.2d 687, 693 (3d Cir. 1981)).

100. 701 F.2d at 227. The court wrote that:

> It follows from *Rowley* that the Act does not authorize residential care merely to enhance an *otherwise sufficient* day program. A handicapped child who would make educational progress in a day program would not be entitled to placement in a residential school merely because the latter would more nearly enable the child to reach his or her full potential. A school committee is required by the Act merely to ensure that the child be placed in a program that provides opportunity for some educational progress.
>
> In the instant case, however, the district court did not order residential care in order to maximize Daniel's potential. Rather the court found that educational benefits which could only be provided through residential care were essential if Daniel was to make any educational progress at all.

701 F.2d at 227 (footnote omitted, emphasis in original). The court's analysis is typical of that employed by other courts in post-*Rowley* residential placement cases. *See supra* note 95, and cases cited therein.

101. *Id.* The *Abrahamson* case contains a valuable analysis of the question of when residential programming is necessary for educational purposes, as compared to custodial or medical purposes. It is useful to compare the *Abrahamson* court's reasoning as to why residential programming is sometimes required by the Act with that of the court in McKenzie v. Jefferson, 566 F. Supp. 404 (D.D.C. 1983), where it was decided that psychiatric residential care is not a related service under the Act. The distinguishing factor seems to be that psychiatric care is medical care, and medical services are not within the ambit of the Act unless for diagnostic or evaluation purposes. 34 C.F.R. § 300.13(a)(1984). On the other hand, residential care for some severely handicapped children is basically educational in nature and is expressly mentioned in the Act as a placement alternative. *Id.* at § 300.551(b)(1). The analytical dilemma encountered in deciding whether residential care is educational, medical, custodial or some of each has generated much debate. *See, e.g.*, Mooney & Aronson, *supra* note 95; Stoppleworth, *supra* note 95.

102. *See, e.g.*, Roncker v. Walter, 700 F.2d 1058, 1063 (6th Cir. 1983) ("Cost is a proper factor

sion-making are the twin requirements that the placement be beneficial and that the child be educated in the least restrictive placement.[103]

The *Abrahamson* decision comports with *Rowley*'s admonition that reviewing courts defer to educators on choices between appropriate educational placements. The Abrahamsons prevailed because the school's day program was not reasonably calculated to lead to educational benefit; therefore, only the residential placement met the *Rowley* standard. The decision reveals that while post-*Rowley* courts extend substantial deference to decisions by educators,[104] they remain willing to intervene when proposed programming falls below the "basic floor of opportunity" guaranteed by the Act.[105]

The *Abrahamson* court described three categories of issues inherent in litigation under the Act: factual issues, questions of educational methodology, and legal issues.[106] According to the *Abrahamson* analysis, *Rowley* left factual issues to the courts.[107] The most important such issue is whether the program in dispute meets the educational benefit standard.[108] The reviewing court renders an independent judgment on this issue.

Questions of educational policy or methodology, on the other hand, are for the educators. Once they choose from among available policies and theories, courts must respect their judgment. It is important to point out, however, that litigation often involves both factual and methodological issues. This is true, for example, in disputes over residential programming. The threshold question in such cases is factual: Do both the residential and nonresidential alternatives meet the *Rowley* test? This question is for the court. Only if it is answered in the affirmative does the

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to consider since excessive spending on one handicapped child deprives other handicapped children."); Age v. Bullitt County Schools, 673 F.2d 141, 145 (6th Cir. 1982).

103. *See Abrahamson*, 701 F.2d at 227 n.7, 230. *See also infra* notes 122-34, and accompanying text.

104. 701 F.2d at 230.

105. *Id.*

106. *Id.* at 230-31.

107. *Id.* at 230.

108. In Doe v. Anrig, 692 F.2d 800 (1st Cir. 1982), another residential placement case, the court addressed the factual issues presented by such litigation. The child had Downs Syndrome and severe mental retardation. State authorities ruled that a non-residential placement was appropriate. On review, the district court found that residential placement was essential. Affirming the lower court, the First Circuit held that the choice between residential and day school settings was not one between competing educational methodologies. This "was not a choice of educational *policy*, but resolution of an individual *factual* issue as to the effect of John's handicap on his ability to benefit from the proposed school setting." 692 F.2d at 806 (emphasis in original). The court wrote that its responsibility to independently determine such fact questions derives from the statement in *Rowley* that the court must decide whether "the individualized educational program developed through the Act's procedures [is] reasonably calculated to enable the child to receive educational benefits." *Id.* (quoting *Rowley*, 458 U.S. at 206-07).

policy question come into play. Even then, however, the court's involvement remains substantial because the educators must choose the alternative which complies with the Act's mainstreaming requirement.[109] Again, courts determine whether this requirement is satisfied. While the decision-making role of educators in residential placement cases is substantial, it aids analysis to realize that it is sandwiched between two issues reserved for independent judicial determination: appropriateness and level of restriction.

In most litigation, resolution of questions of law and statutory interpretation are judicial functions. In *Abrahamson*, the educators interpreted the statutory term "education" so as to exclude services in a residential setting. Under their interpretation, the school had no duty to provide such programming. The district court interpreted the statute differently, and the Court of Appeals held that the lower court's construction was authoritative.[110]

The *Abrahamson* case is representative of the approach adopted in post-*Rowley* residential placement cases. The primary inquiry is whether both program options meet the "basic floor of opportunity" required by the Act.[111] If they do, then courts defer to the decision of the educators, as long as their choice complies with the Act's mainstreaming requirement. The cases demonstrate that courts retain broad authority to inquire into the substantive adequacy of educational programs.[112] While *Rowley* restricted the substantive level of service required by the Act, it did not dilute judicial ardor for requiring school districts to meet their legal responsibilities. If anything, courts now scrutinize proposed programs more carefully than they did before *Rowley*.[113]

A final observation is in order regarding residential placement cases. If a school district employs rigid rules which have the effect of removing residential care from consideration as a service modality, courts will likely invalidate them as inconsistent with the Act's requirement that every child receive individualized services tailored to meet his or her unique needs. This judicial dislike for rigid rules runs through much of

109. 701 F.2d at 227 n.7.

110. *Id.* at 230-31.

111. *See* Colin K. v. Schmidt, 715 F.2d 1 (1st Cir. 1983) (The court determined that the school's proposed day school placement was not reasonably calculated to lead to educational benefit, therefore, residential placement was required). *See also* Hessler v. State Board of Educ., 700 F.2d 134 (4th Cir. 1983); Cain v. Yukon Public School Dist., 556 F. Supp. 605 (W.D. Okla. 1983).

112. *See* Colin K. v. Schmidt, 715 F.2d 1 (1st Cir. 1983); Abrahamson v. Hershman, 701 F.2d 223 (1st Cir. 1983).

113. The enhanced scrutiny is a by-product of the *Rowley* Court's admonition that reviewing courts ensure that the procedural requirements of the Act are satisfied. *See Rowley*, 458 U.S. at 206-07.

the post-*Rowley* litigation.[114]

B. *Least Restrictive Placement Cases*

The Act requires schools "to assure that, to the maximum extent appropriate, handicapped children, . . . are educated with children who are not handicapped."[115] This is the so-called mainstreaming, or least restrictive placement, requirement. It is premised on the theory that handicapped children benefit from frequent interaction with nonhandicapped students.[116]

There have been several post-*Rowley* mainstreaming cases.[117] They reveal that the Supreme Court's decision has limited impact on the way courts address such issues. The case of *Roncker v. Walter*[118] is illustrative of the post-*Rowley* approach. The Roncker child was trainably mentally retarded, with an I.Q. less than 50.[119] School officials sought to place him in a segregated school for handicapped children, while his parents favored placement in a special class located in the public school system. The court began its analysis by distinguishing *Rowley*.[120] It wrote that the Supreme Court's decision was a dispute over educational methodology,[121] while the instant controversy—concerned with the mainstreaming requirement—dealt with issues which were not before the Supreme Court.[122] While *Rowley* was relevant, it was not outcome determinative.

The *Roncker* court framed the issue before it this way:

The Act does not require mainstreaming in every case but its require-

114. If a school district employs rules which exclude certain forms of programming from consideration as options, a reviewing court may strike them down as inconsistent with the requirement that every child's program be individually designed to meet his or her unique needs. For example, in the extended school year cases discussed at *infra* text accompanying notes 127-42, courts struck down rules limiting the school year to 180 days. *See* Colin K. v. Schmidt, 715 F.2d 1, 4 (1st Cir. 1983) (school district had rigid "policy of retaining all learning disabled children in the public school system.") *See infra* notes 137-38, 142.

115. 20 U.S.C. § 1412(5)(B) (1982).

116. *See generally* B. WILLCOX & G. BELLAMY, DESIGN OF HIGH SCHOOL PROGRAMS FOR SEVERELY HANDICAPPED STUDENTS 17-18, 162-63 (1982).

117. Wilson v. Marana Unified School Dist., 735 F.2d 1178 (9th Cir. 1984); Roncker v. Walter, 700 F.2d 1058 (6th Cir. 1983); Springdale School Dist. No. 50 v. Grace, 693 F.2d 41 (8th Cir. 1982); Johnston v. Ann Arbor Public Schools, 569 F. Supp. 1502 (E.D. Mich. 1983). *See* Abrahamson v. Hershman, 701 F.2d 223, 229 (1st Cir. 1983) ("The only substantive limitations Congress placed on the states were the requirements that the policy chosen provide the handicapped child with some educational benefit, *Rowley*, and conform to the Act's mainstreaming requirements.") *See also* Doe v. Lawson, 579 F. Supp. 1314 (D. Mass. 1984) (as between two "appropriate" programs, each of which meets the benefit test, courts must defer to educators).

118. 700 F.2d 1058 (6th Cir. 1983).

119. *Id.* at 1060.

120. *Id.* at 1061-62.

121. *Id.* at 1062.

122. *Id.*

> ment that mainstreaming be provided to the maximum extent appropriate indicates a very strong congressional preference. The proper inquiry is whether a proposed placement is appropriate under the Act. In some cases, a placement which may be considered better for academic reasons may not be appropriate because of the failure to provide for mainstreaming.[123]

In determining whether to approve the school district's preference for a segregated facility, the court was forced to choose between two placements. While not reflected in the court's analysis, its first step was to determine whether both placements satisfied the Supreme Court's benefit test. Naturally, if one of the options failed to measure up to this requirement, it would be disregarded.[124] Concluding, sub silentio, that both placements met the benefit test, the court applied the statutory requirement of maximum mainstreaming. In doing so it adhered to the principle that as between two appropriate programs, the less restrictive must normally be selected. To the extent a placement favored by educators contravenes the mainstreaming requirement, courts need not condone it. With this in mind, the court concluded that the segregated facility preferred by the educators was more restrictive than the alternative favored by the parents. That being so, the court ordered placement in the less restrictive, mainstream placement.[125]

The post-*Rowley* mainstreaming cases reveal that a placement which

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123. *Id.*

124. *Id.*

125. *Id.* The court's approach to the mainstreaming issue is reflected in the following passage:

> The Act does not require mainstreaming in every case but its requirement that mainstreaming be provided to the *maximum* extent appropriate indicates a very strong congressional preference. The proper inquiry is whether a proposed placement is appropriate under the Act. In some cases, a placement which may be considered better for academic reasons may not be appropriate because of the failure to provide for mainstreaming. The perception that a segregated institution is academically superior for a handicapped child may reflect no more than a basic disagreement with the mainstreaming concept. Such a disagreement is not, of course, any basis for not following the Act's mandate. Campbell v. Talladega City Bd. of Education, 518 F.Supp. 47, 55 (N.D. Ala. 1981). In a case where the segregated facility is considered superior, the court should determine whether the services which make the placement superior could be feasibly provided in a non-segregated setting. If they can, the placement in the segregated school would be inappropriate under the Act. Framing the issue in this manner accords the proper respect for the strong preference in favor of mainstreaming while still realizing the possibility that some handicapped children simply must be educated in segregated facilities either because the handicapped child would not benefit from mainstreaming, because any marginal benefits received from mainstreaming are far outweighed by the benefits gained from services which could not feasibly be provided in the non-segregated setting, or because the handicapped child is a disruptive force in the non-segregated setting.

700 F.2d at 1063 (emphasis in original) (footnote omitted).

In a case related to the mainstreaming question, a federal district court sitting in Missouri recently upheld a school district decision to educate severely handicapped children in segregated schools. St. Louis Developmental Disabilities Treatment Center v. Mallory, 591 F.Supp. 1416 (W.D. Mo. 1984).

meets the benefit test may nonetheless fail to satisfy the mainstreaming requirements. When faced with a choice between competing appropriate programs, the strong preference for mainstreaming usually controls. Furthermore, when appropriate programming can be provided in a less restrictive placement, a more restrictive alternative will be rejected even though it is actually more beneficial.

The mainstreaming cases dovetail nicely with the residential placement decisions. Both require application of the benefit test to competing alternatives, and both require judicial deference to decision-making by educators. Furthermore, both require compliance with the statutory requirement of maximum mainstreaming. When the mainstreaming requirement stands in opposition to the wishes of educators, their preference usually gives way. Finally, the post-*Rowley* cases reveal that the Supreme Court's decision did not undermine the role of the courts in mainstreaming cases. The issues involved—appropriateness and level of restriction—are factual in nature, and, as was pointed out above, *Rowley* leaves such issues to the judiciary.[126]

C. *Extended Year Programming Cases*

Many severely handicapped children learn at a painfully slow pace.[127] Even so, the self-sufficiency skills which they acquire are so important that the benefit is well worth the effort and expense. The payoffs are financial, educational, and human. One has only to witness an autistic child learn, after months of training, to recognize and acknowledge his mother to know that this is so. Unfortunately, over the summer vacation period, many seriously handicapped children lose much of what they painstakingly acquire during the school year.[128] This regression is compounded by the fact that it takes them an extraordinarily long time to recoup their losses once back in school.[129] This phenomenon, known as the regression-recoupment syndrome, stands as a serious barrier to achievement for thousands of the most severely handicapped.[130]

Prior to *Rowley*, several courts held that the Act required educational programming in excess of the normal 180 day school year for children affected by the regression-recoupment syndrome.[131] The leading

126. *See supra* notes 108 and 111.

127. *See* Battle v. Pennsylvania, 629 F.2d 269, 274-75 (3d Cir.), *cert. denied sub nom.* Scanlon v. Battle, 452 U.S. 968 (1980).

128. *Id.*

129. *Id.*

130. *Id. See also* Crawford v. Pittman, 708 F.2d 1028, 1030-32 (5th Cir. 1983).

131. *See, e.g.*, Battle v. Pennsylvania, 629 F.2d 269 (3d Cir. 1980), *cert. denied*, 452 U.S. 968 (1980); Georgia A.R.C. v. McDaniel, 511 F. Supp. 1263 (N.D. Ga. 1981), *aff'd*, 716 F.2d 1565 (11th

pre-*Rowley* case is *Battle v. Pennsylvania*.[132] The *Battle* court emphasized the importance of complying with each child's individualized program.[133] The issue was whether Pennsylvania's rigid adherence to a 180 day school year conflicted with the requirement of individualized educational programming.[134] The court stated that:

> We believe the inflexibility of the defendant's policy of refusing to provide more than 180 days of education to be incompatible with the Act's emphasis on the individual. Rather than ascertaining the reasonable educational needs of each child in light of reasonable educational goals, and establishing a reasonable program to attain those goals, the 180 day rule imposes with rigid certainty a program restriction which may be wholly inappropriate to the child's educational objectives. This, the Act will not permit.[135]

There are three major post-*Rowley* extended school year cases.[136] Each struck down rigid school year rules as inconsistent "with the Act's emphasis on the individual," and each relied on *Rowley*'s focus on individualized programming as support for its holding. The analysis utilized by the courts is very similar to that employed in *Battle*. In fact, the decisions emphasize that nothing in *Rowley* necessitates abandonment of the *Battle* approach.[137] The cases point out that every child's program must be individualized and reasonably calculated to permit attainment of goals agreed on by parents and educators. Rigid rules which restrict access to programming or limit its amount preclude the individualization mandated by the Act.[138] Since states accepting funds under the Act agree to

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Cir. 1983), *vacated and remanded*, 104 S. Ct. 3581, *modified following remand on other grounds*, 740 F.2d 902 (11th Cir. 1984).

132. 629 F.2d 269 (3d Cir.), *cert. denied*, 452 U.S. 968 (1980).

133. *Id.* at 278 ("The core of educational programming under the Act is the individualized educational program.")

134. *Id.* at 270-71.

135. *Id.* at 280.

136. Georgia A.R.C. v. McDaniel, 716 F.2d 1565 (11th Cir. 1983), *vacated and remanded*, 104 S. Ct. 3581 (1984), *modified following remand on other grounds*, 740 F.2d 902 (11th Cir. 1984); Crawford v. Pittman, 708 F.2d 1028 (5th Cir. 1983); Yaris v. Special School Dist. of St. Louis County, 558 F. Supp. 545 (E.D. Mo. 1983).

137. *See* Crawford v. Pittman, 708 F.2d 1028, 1034 (5th Cir. 1983). The Fifth Circuit opined that *Rowley* strengthened the result reached in *Battle*. It stated that:

> The Supreme Court's decision in *Rowley* recognized the Act's emphasis on individual consideration. The decision, therefore, implicitly ratifies the Third Circuit's conclusion that categorical limitations on the possible duration of special education programs are simply inconsistent with the Act's insistence on IEPs formulated to meet the unique needs of each handicapped child.

708 F.2d at 1034 (footnote omitted).

138. In Crawford v. Pittman, 708 F.2d 1028 (5th Cir. 1983), the issue was whether the state could "refuse, in formulating . . . IEPs for children within [the] school system, to consider the possible necessity for programs extending beyond 180 days per year." *Id.* at 1030. The court found that:

> The Act requires the state to treat each child as an individual, a human whose unique

abide by its terms, they must abandon such rules.

One of the leading post-*Rowley* cases, *Georgia A.R.C. v. McDaniel*,[139] adopted the foregoing analysis and stated that rigid rules precluding individualization of programming violate both the procedural and substantive standards of the Act.[140] The procedural requirements are abrogated because such rules preclude individualization; perhaps the most important procedural requirement of the Act. The substantive standard—*Rowley*'s educational benefit test—is violated because such rules deny beneficial programming to many of the most severely handicapped.[141] The extended school year cases not only survive *Rowley*, they gain strength from its emphasis on individualized programming.[142]

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qualities and needs can be evaluated and served only by a plan designed with wisdom, care and educational expertise. Its grand design does not tolerate policies that impose a rigid pattern on the education of children.

Id. The court placed great emphasis on the Act's requirement that each child's program be individually tailored to meet his or her unique needs. *Id.* at 1033-34. The court concluded that:

> Mississippi's policy of refusing to consider or provide special education programs of a duration longer than 180 days is inconsistent with its obligations under the Act. Rigid rules like the 180-day limitation violate not only the Act's procedural command that each child receive individual consideration but also its substantive requirements that each child receive some benefit and that lack of funds not bear more heavily on handicapped than non-handicapped children.

Id. at 1035 (footnote omitted). In Yaris v. Special School Dist. of St. Louis County, 558 F. Supp. 545 (E.D. Mo. 1983), the district court employed a similar analysis to strike down a rigid 180 day rule.

139. 716 F.2d 1565 (11th Cir. 1983), *vacated and remanded*, 104 S.Ct. 3581 (1984), *modified following remand on other grounds*, 740 F.2d 902 (11th Cir. 1984).

140. *Id.* at 1576. The court relied on the Fifth Circuit decision in Crawford v. Pittman, 708 F.2d 1028 (5th Cir. 1983). *See supra* note 138.

141. 716 F.2d at 1576.

142. The clear lesson of the extended school year cases is that rigid rules receive very close judicial scrutiny. Any across-the-board rule that precludes consideration of program options or arbitrarily limits duration, type, or quality of programming is suspect. This is not to say that schools are powerless to set limits on programming. Such an idea would be inconsistent with *Rowley*'s emphasis on local control of decision-making and on the minimalist "benefit" test adopted by the Court. For a rule to run afoul of the Act, it must preclude children from the programming they need to achieve the educational benefit required by the Act. If children can achieve "benefit" within the confines of a rule, it will survive judicial review. *See* Crawford v. Pittman, 708 F.2d 1028 (5th Cir. 1983); Georgia A.R.C. v. McDaniel, 716 F.2d 1565 (11th Cir. 1983).

Many examples of improperly rigid rules can be conceived. A rule that no children will be placed in residential settings under any circumstances would violate the Act if one or a class of children required such programming in order to achieve educational benefit. Similarly, a rule limiting speech therapy to one hour per week would be illegal if children needed more of this related service in order to benefit.

School administrators should plan with the "rigid rule" doctrine in mind. They must be prepared to offer programming that exceeds normal limits. At the same time, schools do not have to offer non-educational services. *Compare* Abrahamson v. Hershman, 701 F.2d 223 (1st Cir. 1983) *with* McKenzie v. Jefferson, 566 F. Supp. 404 (D.D.C. 1983). *See supra* note 101, for discussion of these cases.

D. *Summary*

The post-*Rowley* cases reveal three important facts. First, courts remain actively involved in resolution of disputes over educational programming for handicapped children. The Supreme Court's desire to restrict involvement of the judiciary has been only partially successful. Second, post-*Rowley* courts are strict in their enforcement of the procedural requirements of the Act. In particular, they insist that every child receive individually tailored programming. Finally, and for purposes of this article, most importantly, the post-*Rowley* cases demonstrate that the courts have yet to articulate a workable definition of an "appropriate" education. While the cases speak of "appropriate" programming, they do not define the word in functional terms. The substantive uncertainty over this "delphic" requirement remains.

V. A Method for Determination of Appropriateness

This section outlines a proposal for determination of "appropriate" educational programming. The proposal is necessary because the *Rowley* case does not elucidate a method for evaluating the appropriateness of educational programming. While the Supreme Court's educational benefit test goes some distance toward the goal, it falls short for at least two reasons. First, the Court expressly limited its ruling to determination of educational benefit in the context of children attending regular education classes.[143] It did not attempt "to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act."[144] Second, the Court defined "appropriate," a word capable of innumerable shades of meaning, in terms of the similarly obscure "benefit." In short, the *Rowley* decision simply does not give a comprehensive answer to the question of what constitutes an appropriate education. Courts struggling to apply the benefit test are still without clear guidance on the core requirement of the Act.

Unfortunately, the post-*Rowley* cases shed little helpful light on the benefit test. The extended school year cases avoid the conundrum by basing their holdings primarily on violations of the procedural requirements of the Act.[145] The rigid rules struck down in those cases precluded the individualized programming required for each child. While such rules also deny beneficial programming to severely handicapped children, the cases do not call for an analysis of that term, and the courts avoid the issue. The residential placement and mainstreaming cases are

143. *Rowley*, 458 U.S. at 202.
144. *Id.*
145. *See supra* note 138.

no more enlightening. To be sure, they require that each of the proposed placements meet the benefit test, but they do not suggest a method to analyze the benefit issue.

Courts have good reason to sidestep the "appropriate-benefit" puzzle. It may not be possible to formulate an assessment tool which can be employed with all children and which yields a clear measurement of benefit in every case. This difficulty aside, however, educational programs must be created and cases decided. With this practical reality in mind, it becomes imperative to reduce the Supreme Court's gloss on the Act to a workable process for evaluation of educational benefit. As a point of departure, it is well to recall the meaning of "education." It has been described as

> the aggregate of all the processes by means of which a person develops abilities, attitudes, and other forms of behavior of positive value in the society in which he lives . . . [and] the social process by which people are subjected to the influence of a selected and controlled environment (especially that of the school) so that they may attain social competence and optimum individual development.[146]

Education's key role is in the development of skills and attainment of goals. It is not an exaggeration to say that achievement of realistic goals is the *sine qua non* of education. With passage of the Act, Congress sought to bring millions of handicapped children into the schools so that they too could achieve realistically attainable goals. The *raison d'etre* of the Act is assistance of handicapped children on their road to independence. In *Rowley*, the Supreme Court reiterated the importance of goal-oriented programming. The Justices spoke of "obtainable" benefits, acquisition of skills, and "educational progress."[147] Indeed, the Court decided that Amy Rowley was receiving an appropriate education precisely because she was progressing from grade to grade and meeting the educational goals established for other children her age.[148]

With the foregoing as background, we can articulate a methodology for assessment of educational benefit. Simply put, an appropriate education is one that enables a handicapped child to make measurable progress toward educational goals which are within his or her ability. Determination of appropriateness consists of three steps: First, the child's ability is assessed.[149] While this is not always easy, the literature reveals that it

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146. DICTIONARY OF EDUCATION 202 (3d ed. 1973).

147. *See Rowley*, 458 U.S. at 202-04.

148. *Id.* at 209-10.

149. Children are assessed with standardized psychological and educational tests, behavioral observations, interviews, and behavior checklists. *See generally* D. GELFAND, W. JENSON & C. DREW, UNDERSTANDING CHILD BEHAVIOR DISORDERS (1982). Assessment of ability frequently focuses on the child's academic ability. Comparisons are made between the child's test results and the re-

can be done.[150] Second, educational goals are established and are set some distance ahead of the child's present level of achievement.[151] When deciding how far ahead, we recall the Supreme Court's admonition that educators are not required to maximize potential.[152] On the other hand, goals which are not set in terms of attainable skills do not meet the standard required by the Act.[153] Third, procedures are created to measure a child's progress. The technology for such measurement is available.[154]

In the final analysis, a child receives appropriate educational programming when he or she makes progress as a result of the programming. Progress is not simply a by-product of appropriate programming; it is appropriate programming. Progress equals benefit. Measurable progress is proof of appropriate programming. As the court correctly stated in *Battle v. Pennsylvania*, educational "needs are necessarily determined in reference to goals. . . . The only reason a child needs certain programming is to accomplish certain educational objectives."[155] Conceptu-

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sults which would be expected from children in the same grade level or age group. J. SALVIA & J. YSSELDYKE, ASSESSMENT IN SPECIAL AND REMEDIAL EDUCATION 15-16 (1981). General intellectual ability is assessed by standardized intelligence tests. These devices compare an individual's score with a group derived score that sets the average IQ at 100. J. SATTLER, ASSESSMENT OF CHILDREN'S INTELLIGENCE 12, 19 (1974). The ability of a child to function independently and successfully in real world situations is generally assessed by adaptive behavior checklists. These checklists require some knowledge of the child. They allow comparison with age normed scores in the areas of social responsibility, language, self-help skills, and responsibility. ADAPTIVE BEHAVIOR: CONCEPTS & MEASUREMENTS 141, 251-52 (A. COULTER & H. MORROW, eds. 1978)

Regulations promulgated under the Act require schools to evaluate handicapped children at least once every three years. 34 C.F.R. § 300.534(b) (1984). Some or all of the techniques described above are used in the evaluation process.

150. Valid educational assessment is possible as long as properly qualified professionals perform the assessment and utilize appropriate techniques. J. SALVIA & J. YSSELDYKE, *supra* note 149, at 9. Problems with assessment can arise in many ways. For example, assessment data is questionable, and in some instances discriminatory, when standardized tests are used with minority students. *See* Bersoff, *The Legal Regulation of School Psychology*, in THE HANDBOOK OF SCHOOL PSYCHOLOGY (1982); Lyon, *Social and Legal Issues in Testing*, in EDUCATIONAL AND PSYCHOLOGICAL ASSESSMENT OF EXCEPTIONAL CHILDREN (1982).

151. It is difficult to establish an exact standard on how far ahead of present functioning a long term educational goal or short term objective should be set. A general rule of thumb is that the more severe the handicap, the closer the goal should be set to the child's present level of functioning. For example, a severely handicapped, self-injurious autistic child may need long term goals and short term objectives that are set relatively close to the present level of functioning. With severe cases, a small amount of progress can be significant. On the other hand, the goals for a mildly handicapped, learning disabled child may be set to parallel those of non-handicapped children. *See* D. MORGAN, A PRIMER ON INDIVIDUALIZED EDUCATION PROGRAMS FOR EXCEPTIONAL CHILDREN: PREFERRED STRATEGIES AND PRACTICES (1981).

152. *Rowley*, 458 U.S. at 198.

153. The entire thrust of the Act contemplates movement toward goals. *See* EDUCATION OF THE HANDICAPPED ACT, PUB. L. NO. 94-142, 89 Stat. 774-75 (1975) (Congressional Statement of Findings and Purpose).

154. *See* D. MORGAN, *supra* note 151.

155. 629 F.2d at 276. In Town of Burlington v. Dept. of Educ., 736 F.2d 773 (1st Cir. 1984), the

alizing appropriate programming as programming which leads to progress for the child is consistent with the Act, the *Rowley* decision, and the post-*Rowley* cases. Support for this proposition is set forth in the following subsections.

A. *The Individualized Education Program Required by the Act is Consistent with the Proposal*

Setting forth the basic components of an appropriate education is essential, but it is only half the task. It remains to put the criteria in a working context which allows for implementation in individual cases. Fortunately, the Act utilizes a mechanism that is well suited to this end.[156] This mechanism is the individualized education program (IEP) which is required for every child.[157] The written IEP is the "core of educational programming under the Act."[158] Formulated at least annu-

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court addressed the question of "whether state substantive standards which guarantee a higher level of educational quality and benefits for disabled children than the federal minimum will be given effect in federal courts." *Id.* at 788. In considering this question, the court described the *Rowley* standard, and concluded that the benefit test is tied to "achievement of effective results." *Id.* The court stated, in dicta, that:

> The *Rowley* Court, in interpreting the federal Act, found it "generates no additional requirement that the services so provided be sufficient to maximize each child's potential 'commensurate with the opportunities provided other children.' " *Rowley* at 198, 102 S.Ct. at 3046. But the Court also held the Act to contain a federal minimum standard, a "basic floor," of beneficial education. *Rowley* at 201, 102 S.Ct. at 3048. While the Court did not articulate "one test for determining the adequacy of educational benefits conferred upon all children covered by the Act," *Rowley* at 202 , 102 S.Ct. at 3049, it did identify some basic guidelines. It construed the federal standard to require, inter alia, personalized instruction based on a determination of the unique needs of the disabled child with sufficient support services to permit the child to benefit educationally from that instruction. It also found that the plan must be "reasonably calculated to enable the [specific] child to receive educational benefits," *id.* at 207, 102 S.Ct. at 3051. It seems clear that 1401(16), which states " 'special-education' means specially designed instruction . . . to meet the unique needs of a handicapped child," and 1401(18), which specifies the formal requirements of a "free appropriate public education," require that all of a child's special needs must be addressed in the educational plan. The objective of the federal floor, then, is the achievement of effective results— demonstrable improvement in the educational and personal skills identified as special needs—as a consequence of implementing the proposed IEP.

Id. (footnotes omitted).

The *Burlington* court's formulation of educational benefit in terms of "demonstrable improvement" is consistent with the proposal espoused in this article. *See also Beneficial Education*, *supra* note 7, at 295-300, where the author suggests a method for assessment of educational benefit consistent with that described in *Burlington* and this article.

156. This mechanism is the individualized education program (IEP) required for each child. The proposal for assessment of appropriate programming contained in this article is directly related to the IEP.

157. 20 U.S.C. §§ 1413(a)(4)(B), 1414(a)(5) (1982); 34 C.F.R. §§ 300.341-300.349 (1984).

158. Battle v. Pennsylvania, 629 F.2d 269, 278 (3d Cir.), *cert. denied*, 452 U.S. 968 (1980). Courts have stressed the importance of the IEP. In Georgia A.R.C. v. McDaniel, 716 F.2d 1565, 1570 (11th Cir. 1983), the court stated that "[t]he IEP is more than a mere exercise in public relations. It becomes the basis for a handicapped child's entitlement to an education in conformance with the IEP . . . and for a host of procedural rights in the event a child's education deviates from a mutually arrived upon IEP." In Tatro v. Texas, 703 F.2d 823, 830 (5th Cir. 1983), *aff'd in part,*

ally, the IEP is created by a team of educators, the parents, and, when appropriate, the child.[159] The IEP document becomes the road map to the child's program. It contains the following important information:

> (a) A statement of the present levels of educational performance of the child,
>
> (b) A statement of annual goals, including short-term instructional objectives,
>
> (c) A statement of the specific educational services to be provided, and the extent to which the child will be able to participate in regular education programs,
>
> (d) The projected date for initiation and anticipated duration of such services, and
>
> (e) Appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether the child's goals are being met.[160]

The proposed criteria for appropriateness fit neatly within the parameters of the IEP. A properly drawn IEP should contain all of the data necessary for utilization of the criteria.[161] In particular, it should contain adequate information on the child's current levels of performance and his or her ability to achieve beyond those levels. The goals set

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rev'd in part, sub nom., Irving Indep. School Dist. v. Tatro, 104 S.Ct. 3371 (1984), the court remarked that "[t]he IEP is the educational blueprint that specifies how the child is to be taught, sets goals and determines how progress is to be measured . . . . As such, the IEP is the primary vehicle for implementing the requirements of the EAHCA." In Cain v. Yukon Public Schools, 556 F. Supp. 605, 608-09 (W.D. Okla. 1983), the court stated that "[t]he appropriate public education requirement is based in large part upon the 'individualized educational program.'" Finally, in Yaris v. Special School Dist. of St. Louis County, 558 F. Supp. 545, 558 (E.D. Mo. 1983), the court observed that "[t]he IEP guarantees the handicapped child, procedurally and substantively, a free appropriate education."

159. 34 C.F.R. § 300.344 (1984). The regulation describes the participants in the IEP meeting as follows:

> (a) General. The public agency shall insure that each meeting includes the following participants:
>
> (1) A representative of the public agency, other than the child's teacher, who is qualified to provide, or supervise the provision of, special education.
>
> (2) The child's teacher.
>
> (3) One or both of the child's parents, subject to § 300.345.
>
> (4) The child, where appropriate.
>
> (5) Other individuals at the discretion of the parent or agency.
>
> (b) Evaluation personnel. For a handicapped child who has been evaluated for the first time, the public agency shall insure:
>
> (1) That a member of the evaluation team participates in the meeting; or
>
> (2) That the representative of the public agency, the child's teacher, or some other person is present at the meeting who is knowledgeable about the evaluation procedures used with the child and is familiar with the results of the evaluation.

160. *Id.* at § 300.346.

161. A properly drawn IEP contains all information needed to implement the proposed criteria. Most of what is needed is required by the regulation cited at *supra* note 160. In addition to information required by the regulation, the IEP should contain a description of the child's ability. *See infra* text accompanying note 173.

forth in the IEP should be set so that movement toward them will improve the child's skills in enumerated areas. Finally, the criteria and techniques for measurement of progress should be delineated. A properly drawn IEP, based on a thorough assessment of the child,[162] serves as the basic tool used by educators to achieve the measurable progress mandated by the Act.

B. Measurement of Progress

If benefit is defined in terms of progress, it is essential that procedures be implemented to measure progress or document its absence. Such procedures must be reliable and must measure what they purport to measure.[163] Furthermore, they must be objective in nature[164] and capable of written recordation. Subjective observations and opinions must be avoided as unreliable and subject to bias.[165]

In order to measure progress, it is necessary to establish the child's

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162. The Act requires that every handicapped child be evaluated. 20 U.S.C. § 1412(5)(c) (1982); 34 C.F.R. §§ 300.530(b), 300.543 (1984).

163. Measurement procedures must be psychometrically sound, which means that they must have good reliability and validity. *See* E. CARMINES & R. ZELLER, RELIABILITY AND VALIDITY ASSESSMENT (1981). Both reliability and validity are measures of error which are associated with a particular measurement procedure. D. GELFAND, W. JENSON, & L. DREW, *supra* note 149, at 123-25. Reliability is a measurement of how consistently an assessment procedure measures what it purports to measure. D. GELFAND & D. HARTMANN, CHILD BEHAVIOR ANALYSIS AND THERAPY 168-69 (2nd ed. 1984). There are two basic types of reliability: test-retest reliability and inter-rater reliability. With test-retest reliability, the consistency of an assessment procedure is determined by administering the procedure, waiting a period of time, and re-administering the procedure. If similar results are obtained on both administrations, the instrument has test-retest reliability. Inter-rater reliability is a measurement to determine the degree of consistency between two people who have given the same assessment procedure to the same child. For example, if two people observe a child and fill out the same type of behavior checklist, the extent to which they agree is a measure of inter-rater reliability.

Validity is an indication of how accurately an assessment procedure measures what it purports to measure. For example, if a procedure (such as a behavior checklist) purports to measure hyperactivity, its validity is assessed by comparing its results to those achieved by use of an accepted standard for measuring hyperactivity.

A number of assessment tools which are frequently employed with handicapped children are of questionable validity. The list includes projective tests (*e.g.*, some ink blot tests, story telling tests, draw-a-person tests), nonstructured interviews, and anecdotal information based on observations. *See generally* R. GITTELMAN-KLEIN, VALIDITY OF PROJECTIVE TESTS FOR PSYCHODIAGNOSIS IN CHILDREN, IN CRITICAL ISSUES IN PSYCHIATRIC DIAGNOSIS 141-66 (R. SPITZER & D. KLEIN, eds., 1978); D. GELFAND, W. JENSON & C. DREW, *supra* note 151, at 19.

164. To be minimally objective, data must be gathered in a systematic and structured manner. Such regimentation and quantification protects against the threat of poor reliability and validity. Objective information gathering requires standard sets of instructions and procedures on how to gather information. Little interpretative discretion is left to the person gathering the information.

165. Written records are important because they leave a permanent record that can be used when accountability is important. D. MORGAN, A PRIMER ON INDIVIDUALIZED EDUCATION PROGRAMS FOR EXCEPTIONAL CHILDREN: PREFERRED STRATEGIES AND PRACTICES 19 (1981). If a description of a problem area cannot be reduced to writing, it probably cannot be assessed and

current level of functioning. To do so, baseline data is gathered.[166] There are two basic types of baseline measures: (1) criterion referenced, in which a handicapped child is compared to him or herself on a series of measures[167] and (2) normative referenced, in which a handicapped child is compared to an average standardization group of children.[168]

Once baseline data is gathered, procedures are implemented to document progress toward educational goals. Documentation must be done frequently, preferably on a daily basis.[169] Retrospective or subjective recreation of progress is vulnerable to unacceptable bias.[170] The methodol-

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measured accurately. In addition, impressions that are not written are subject to wide interpretation, bias (a validity problem), and inaccurate memory (a reliability problem).

Subjective observations and opinions are subject to significant error due to bias. Foster, Ysseldyke & Reese, *"I Wouldn't Have Seen It If I Hadn't Believed It"*, 41 EXCEPTIONAL CHILDREN 469 (1975). *See also* Ysseldyke & Foster, *Bias in Teachers' Observations of Emotionally Disturbed and Learning Disabled Children*, 44 EXCEPTIONAL CHILDREN 613 (1978). Even an opinion based on experienced clinical or educational judgment can be subject to tremendous bias and error. Rosenhan, *On Being Sane in Insane Places*, 179 SCIENCE 250 (1973). The only effective guard against such error and bias is a structured and systematic approach to the collection of assessment information. The approach must utilize procedures with proven reliability and validity. D. GELFAND, W. JENSON & C. DREW, *supra* note 165, at 123-25.

166. A baseline is a standard of comparison that is used to determine if an educational procedure or intervention has been effective. Baselines are collected before educational intervention is started so that change can be assessed. A baseline can involve a comparison between a subject's performance before and after intervention (criterion referenced), or it can involve a comparison of the individual to a group standard before and after intervention (normative referenced). D. GELFAND & D. HARTMANN, *supra* note 163.

167. Criterion referenced measures compare an individual's performance of a skill before and after intervention. The basic advantage of a criterion baseline is that the child is compared to him- or herself, not to a group average. With criterion-referenced measures, the emphasis is placed on assessing specific individual skills and abilities. R. GLASER, *Instructional Technology and the Measurement of Learning Outcomes*, 18 AM. PSYCHOLOGIST 519 (1963). *See also* J. SALVIA & J. YSSELDYKE *supra* note 149, at 217.

168. Most standardized educational and psychological tests are normative referenced. A person's performance is compared to his or her peers. The emphasis is placed on the relative standing of a person when a particular skill or ability is compared to a group average. J. SALVIA & J. YSSELDYKE, *supra* note 149, at 114-27. For example, intelligence tests are normative referenced tests in which an individual's IQ score is compared to a group set of scores from his or her peers of the same age and cultural composition. If the individual obtains an IQ score of 115 (the average score for the standardization group is 100) then he or she has a superior score compared to the group. Normative referenced assessment can be problematic if the standardization group on which the procedure is based is significantly different (culturally, by language, age, sex, geographical area, or socioeconomic background) than the individual being assessed.

169. Continuous assessment and documentation are necessary if the educator is to know whether a program is effective. *See* D. GELFAND, W. JENSON, & C. DREW, *supra* note 149; D. MORGAN, *supra* note 151. Measures taken at the beginning and end of the school year are clearly too infrequent. If a program is not working, a full year can be wasted. The best approach is to gather assessment data as often as possible, preferably on a daily basis. Daily measurements can be compiled on a weekly basis. Such data collection permits educators to keep their finger on the pulse of the child's program. Less frequent data collection can lead to stagnation or failure to diagnose new problems.

170. Retrospective recreation of progress is totally inadequate from an educational point of view.

ogy used to measure progress should be subject to negotiation between parents and educators, keeping in mind, of course, that professionals are usually in a better position to suggest appropriate measuring techniques. The technique selected should be included in the child's written education program along with a description of how data on the child's progress will be gathered and maintained.

Placing responsibility for collection and maintenance of measurement data on the school is appropriate. Educators have access to the child during educational programming. They also possess the expertise to record and analyze the data. Taking this responsibility a step further, it seems logical and even necessary to hold that failure to collect and maintain such data should raise a presumption that the school's program is not beneficial. Since educators have custody and control of the principal sources of information concerning the appropriateness of the child's program, it is reasonable to conclude that failure to maintain and produce data supporting a contention of appropriate programming constitutes evidence to the contrary. Such a presumption will protect parents, whose access to information on progress is limited. It will also give schools added incentive to maintain the required data.

C. *Assessment of Ability*

Assessment of a child's ability to make educational progress is difficult; however, the technology to do so is available.[171] When a child has been thoroughly evaluated, educators can draw on the professional literature and their experience with the child to reach conclusions about his or her ability. Educators can make judgments regarding the child's ability across a spectrum of skills based on their assessment of available data, the child's history, and their own professional experience.[172]

When ability has been assessed, a written summary of the findings should be incorporated into the child's IEP.[173] When the child's abilities

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It is impossible to make an objective baseline comparison if data is not collected prior to the implementation of educational interventions. Memory is inaccurate and subject to bias. The only meaningful way to assess a child's progress is to establish a baseline of the level of functioning before implementing an intervention, and to compare the baseline data with data collected during programming.

171. *See supra* note 163.

172. The number of goals selected for a child should be set at a reasonable number so that programs can be defined and monitored effectively. Too few goals shortchange a child's educational program, too many make monitoring and implementation difficult. The total number depends on the severity of the handicapping condition. A reasonable number of goals can range from as few as three to as many as ten. If an IEP includes more than ten goals, it may be functionally impossible to implement the programs and monitor them effectively.

173. The regulation setting forth the requirements of the IEP does not call for a statement of the child's ability. *See* 34 C.F.R. § 300.346 (1984). However, the statement should be added to the

are juxtaposed with his or her present level of educational functioning—a statement of which must be included in the IEP—the team constructing the child's program has before it the information needed to select particularized educational goals.

D. *Selection of Educational Goals*

When a child's ability has been assessed and documented, it remains to select educational goals. Selection of goals is the work of the IEP team. Each child's goals are unique. They should be set forth in detail in the IEP. While the best possible programming need not be provided, in no case should courts accept the position that no progress is possible. As one court put it, "the Act simply [does] not entertain the possibility that some children may be untrainable."[174]

E. *The Proposed Methodology is Consistent with* Rowley

Tying appropriateness to measurable progress toward goals is entirely consistent with the *Rowley* decision. It is perhaps not too strong to suggest that the *Rowley* benefit test makes no sense, educationally or legally, unless it is firmly linked to progress. By equating a beneficial education with an education that works, the Court's interpretation of the Act becomes logical and consistent with the legislative history. As the Court itself remarked, "[i]t would do little good for Congress to spend millions of dollars in providing access to public education only to have the handicapped child receive no benefit from that education."[175]

One of the principal reasons the Supreme Court rejected the trial court's "equal opportunity" approach to the meaning of appropriateness was that it called for "impossible measurements and comparisons."[176] The proposed methodology is not subject to this criticism. This is so in large part because the methodology does not call for comparisons between programming for handicapped and nonhandicapped children. By conceptualizing appropriateness in terms of measurable progress toward educational goals which are within the child's ability, unworkable comparisons are avoided.

The elements of the proposed criteria for appropriateness are susceptible to ordinary methods of proof, and are neither unwieldy or be-

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basic IEP requirements. The necessary information can often be gleaned from the child's evaluation data.

174. Kruelle v. New Castle County School Dist, 642 F.2d 687, 695 (3d Cir. 1981). Children must be afforded an appropriate education regardless of the severity of their handicap. *See Rowley*, 458 U.S. at 202 n.23.

175. *Rowley*, 458 U.S. at 200-01.

176. *Id.* at 198.

yond the competence of judges.[177] Whether or not a child is making measurable progress is a question of fact. Proof on the issue can be adduced through discovery and examination of witnesses in the normal course of litigation.[178] Assessment of a child's ability is admittedly a more difficult factual question; however, it is precisely the type of factual determination which the post-*Rowley* courts hold to be a judicial function.[179]

Finally, the proposed criteria do not require judges to choose between competing educational methodologies, an undertaking which the Supreme Court expressly held to be beyond the role of the courts.[180] A court's review is limited to questions of fact. If the evidence establishes that a child is making measurable progress toward his or her goals, then the benefit test is satisfied, and the court's inquiry is at an end. This result is entirely consistent with the *Rowley* Court's statement that educators do not have to maximize the potential of handicapped children.[181]

F. *The Burden of Proof in Cases of Nonachievement*

Progress toward goals is the *sine qua non* of a beneficial education; however, we must admit that sometimes children do not advance. Congress recognized this possibility in the legislative history, which states that "providing special education and related services to handicapped children is not guaranteed to produce any particular outcome."[182] Many

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177. The proposal calls for the court to make several types of factual determinations. For example, what is the child's ability? Are the child's educational goals set ahead of his or her current level of functioning? Is the child making measurable progress? If the program has yet to be implemented, does the evidence support a finding that progress will be made? These questions are factual in nature, and can be established through testimony of educators and other experts.

178. Parents are entitled to access to their child's school record. 34 C.F.R. §§ 300.560-300.576 & pt. 99 (1984). This right may obviate the need for discovery in many cases.

179. *See, e.g.*, Abrahamson v. Hershman, 701 F.2d 223, 230-31 (1st Cir. 1983).

180. *Rowley*, 458 U.S. at 208.

181. *Id.* at 198.

182. SENATE REPORT, *supra* note 4, at 11, *reprinted in* 1975 U.S. CODE CONG. & AD. NEWS 1425, 1435. *See Rowley*, 458 U.S. at 192. The regulations promulgated under the Act make it clear that educators are not to be held legally accountable in cases where children do not meet their IEP goals. 34 C.F.R. § 300.349 (1984). The regulation and interpretive Comment state that:

> Each public agency must provide special education and related services to a handicapped child in accordance with an individualized education program. However, Part B of the Act does not require that any agency, teacher, or other person be held accountable if a child does not achieve the growth projected in the annual goals and objectives.
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> • • •
>
> Comment. This section is intended to relieve concerns that the individualized education program constitutes a guarantee by the public agency and the teacher that a child will progress at a specified rate. However, this section does not relieve agencies and teachers from making good faith efforts to assist the child in achieving the objectives and goals listed in the individualized education program. Further, the section does not limit a parent's right to complain and ask for revisions of the child's program, or to invoke due process procedures, if the parent feels that these efforts are not being made.

factors can cause a child to stagnate. It is submitted, however, that in the vast majority of cases the cause lies in a failure to provide necessary programming, not in the child.[183] Because it is the responsibility of educators to provide every handicapped child with an appropriate education, and because evidence accounting for nonachievement is within their control, it is appropriate to place the burden of explanation on their shoulders. Absence of a satisfactory explanation should be evidence that programming is not beneficial within the meaning of the Act.[184]

G. *Appropriateness of Programming Which has Yet to be Implemented*

The proposal outlined above conceptualizes beneficial educational programming as progress toward educational goals. A pragmatic problem with the proposal is that many disputes over programming involve options which have yet to be implemented. In such cases there is no track record of progress or the lack thereof. Rather, the court is asked to choose between unknowns; between two programs, neither of which has withstood the test of implementation. Do such cases require courts to enter the forbidden ground of choice between competing educational methodologies? We believe the answer is no. The task of the court is to make factual determinations based on admissible evidence. Will both programs meet the educational benefit test; that is, will both lead to measurable progress? If the answer is in the affirmative, the court must defer to the choice of educators. Admittedly, it is difficult for a reviewing court to assess the benefit of programs which have not been implemented. Through the use of expert testimony and other evidence, how-

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Id.

The regulation is designed to ensure that educators making good faith efforts on behalf of handicapped children are not held legally accountable for lack of progress. However, nothing in the Act, its legislative history, or the regulations relieves educators of the responsibility to afford every child individualized programming reasonably calculated to lead to educational benefit. Lack of progress may be excusable but lack of effort clearly is not.

183. Numerous examples from educational and popular literature highlight children that were abandoned by one group of teachers only to blossom under others. Early examples include the wild boy of Aveyron and Helen Keller.

Handicapped children can make educational progress even with the most devastating handicapping conditions. The progress may be limited, and the handicapping condition may not be cured, but significant progress can be made. It is all too easy to blame the handicapped child for a failure of the educational system. In the vast majority of cases, it is a misapplied educational program that causes failure. Such things as inappropriate programming, use of non-scientifically validated procedures, non-data based-interventions, lack of frequent assessment, inadequate funding and use of poorly trained staff can all lead to failure. The victim? The child, of course.

184. Placing this burden on the educators should prove a powerful incentive for the generation and retention of appropriate records. *See* Lang v. Braintree School Comm., 545 F. Supp. 1221, 1228 (D. Mass. 1982); Davis v. Dist. of Columbia Bd. of Educ., 530 F. Supp. 1209, 1211-12 (D.D.C. 1982) ("It is the school district's burden of proof to show that its proposal is indeed an appropriate one."). *See also* Zirkel, *supra* note 22, at 485; *What's Left*, *supra* note 7, at 731-33.

ever, it should be entirely possible to determine the factual question of whether a proposed program will lead to progress. That being so, the court will not be called on to make impossible or improper decisions.

VI. Minimally Effective Programming Is Inappropriate If It Is a Clear and Substantial Departure from the Norm Expected for Similarly Situated Handicapped Children

The preceding section sets forth what the authors believe to be the functional meaning of the "basic floor of opportunity" guaranteed by the Act. Critics will immediately point out that under the suggested approach, educators could successfully defend programming of the most minimal adequacy; programming which would fail to provide children a reasonable opportunity to achieve educational goals within their grasp. For example, critics will argue that under the proposed definition of "appropriate" educational programming, miniscule measurable progress toward one of a child's individualized goals would suffice. Surely the Act, as interpreted by *Rowley*, cannot lend the imprimatur of appropriateness to such patently inadequate and ineffective programming.

To argue that the Act requires something more than any measurable progress toward a child's goals is to place one foot in quicksand. Taking this step moves us beyond the irreducible minimum required by the law into the gray area lying between minimally adequate programming and programming designed to maximize the child's potential. How far into this gray area must programming be carried? One answer is "no distance at all." The minimalist definition outlined above is all the Act mandates. Anything beyond the minimum is afforded gratuitously in the name of aspirational goals held by educators. Yet, as pointed out above, this approach unwittingly allows objectively inadequate programming to slide by under a cruel twist of the concept of benefit. It is believed that the Act does require more than the bare minimum of some measurable progress. Congress intended more. The Supreme Court contemplated more. Most tellingly, the entire literature, philosophy, practice and purpose of education demands more.

In most cases, a child making measurable progress toward his or her IEP goals is receiving an "appropriate" education. The problem comes when minimal progress is achieved, but it is so miniscule that the child makes no useful progress toward essential skills. The child is educationally stagnant. In such cases it is possible to compare the child with similarly situated handicapped children in order to determine whether the amount of progress being made constitutes a clear and substantial depar-

ture from the generally agreed potential of such children.[185] Evidence of a clear and substantial departure from the norm for similarly situated handicapped children should constitute evidence that programming falls short of minimally adequate standards.

An example should illustrate the concept. Mike is a six year old autistic child. He engages in head banging behavior; hitting his head on the floor an average of six times per minute. One of Mike's IEP goals is to reduce head banging behavior to zero within four months. After two months, Mike's head banging has been reduced to an average of five times per minute. This is measurable progress towards one of the child's IEP goals. Does this progress mean that Mike is receiving an appropriate education? Not necessarily. If the scientific literature reveals that autistic children with symptoms like Mike's can be trained to discontinue serious self-destructive behavior within a period of two to three months, then Mike's miniscule progress constitutes a clear and substantial departure from the norm for similarly situated children. Thus, even though some progress is registered, the child is not receiving an appropriate education.

What is proposed, then, is an addition to the basic requirement of some measurable progress toward IEP goals. To render measurable pro-

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185. Critics may argue that comparisons between handicapped children will lead to the problem of comparing apples and oranges. In the final analysis, however, comparisons are both inevitable and essential. The body of scientific literature on education of handicapped children is based on comparisons between children with similar handicaps. Without the ability to draw conclusions about one child from what we know about others with similar problems, we are forced to begin anew with each child. This is not done in practice, nor should it be. In the end, comparisons are sometimes necessary and appropriate in order to ascertain whether a child is progressing.

The effort to define "appropriate" educational programming is plagued with an overriding conceptual and linguistic difficulty. In order to describe the meaning of appropriateness—a word which is open to numerous shades of meaning—it is necessary to utilize other words, words which are themselves subject to conflicting interpretations. The Supreme Court's effort is a good illustration. The Court described an "appropriate" education as "beneficial" or "meaningful." The use of one descriptive word to define another does little more than sharpen the focus on a concept which stubbornly refuses to be brought squarely and sharply into view. The exact meaning continues to allude us. This is not to say that efforts at definition are useless. In point of fact they are essential. Through utilization of progressively narrower and more descriptive words, we gradually elucidate the core meaning of an otherwise elusive concept. The Court's choice of the word "benefit" to describe "appropriate" educational programming is a good example. The word has connotations which are narrower and more descriptive than the word "appropriate." The proposal described in the text, which is tied to measurable progress toward explicit goals, is narrower yet, drawing the concept of appropriate programming into workable focus.

The "clear and substantial deviation" standard outlined in Section VI is another example of a deliberate choice of words based on an assessment of their clarity and narrowness of meaning. To be sure, we do not (cannot) offer a bright line test to differentiate a clear and substantial deviation from one that falls within acceptable limits. However, the combined use of two words carrying such obvious connotations should assist in determining where to draw the line in actual cases. The clear and substantial deviation standard may employ weasel words, but they are helpful weasel words.

gress educationally meaningful, it must not be so small as to constitute a clear and substantial departure from the type and amount of progress reasonably expected from a child with the nature and severity of handicap in question. If measurable progress is being made—even though less than would normally be expected—the Act is satisfied. However, if progress is so minor as to constitute a clear and substantial departure from what could reasonably be expected from similarly situated handicapped children, then programming falls short of the minimum required by the Act.

Engrafting the "clear and substantial departure" standard onto the basic floor of opportunity provided by the Act moves us a safe, calculable, and necessary distance into the gray area separating minimal progress from programming designed to maximize potential. The standard will be applicable in practice without undue burden or difficulty. Expert testimony can establish whether the requisite departure has occurred. Furthermore, the standard does not require difficult comparisons between handicapped and nonhandicapped children; an undertaking which the *Rowley* Court expressly disapproved.[186] The only comparison required is between the progress made by a particular child and the progress which the scientific literature, as interpreted through expert testimony, indicates can reasonably be expected. In cases of clear and substantial departure, a child is not receiving an appropriate education.

VII. Conclusion

For thousands of handicapped children, the goal of appropriate educational programming remains an unfulfilled dream. The Education for All Handicapped Children Act is a tremendous step in the right direction. Indeed, the quality of special education programs has increased dramatically under the guiding influence of the Act. Yet, many obstacles have been placed athwart the path toward progress. The *Rowley* Court's pinched and miserly interpretation of the Act slowed progress. Chronic lack of funding continues to plague our educational system. Systematic and widespread lack of creativity abounds in the educational bureaucracy as it does in all large organizations. Many educators frankly give education of the handicapped low priority. Among professionals working in special education, there is often a tremendous resistance to embracing parents as co-equals in the education decision-making process.

Despite these obstacles, parents persist in their demand for appropriate programming for their children. Enlightened and dedicated educators strive for the same result. The modest proposal outlined in this

186. *Rowley*, 458 U.S. at 198-99.

article should assist in their efforts. Concentration on measurable progress will keep the focus squarely on where the child is going. Using progress as the watchword for appropriateness should alert parents and educators the moment something goes awry so that immediate corrective measures can be implemented. Finally, conceptualizing appropriate programming in terms of measurable progress removes individualized programming from the shadow of vague terminology into the light of objective, scientifically verifiable and measurable fact. Once this is accomplished, all concerned can get on with the formidable but attainable task of educating handicapped children.